

(2012) 06 GAU CK 0012

In the Gauhati High Court

Case No : Regular Second Appeal No.78 of 2000

Shri Pawan Kumar Patodia

APPELLANT

Vs

Vijoy Kumar Bhutoria, M/s Hindustan Lever Ltd. and Messrs
Chokesey Bhargava and Co. Registrar's and Share Transfer
Agents, Brook Bond India Limited

RESPONDENT

Date of Decision : 05-06-2012

Acts Referred:

Companies Act, 1956 — Section 108, 108B, 110, 111
Limitation Act, 1963 — Section 21, 22, 6, 6(1)
Securities Contracts (Regulation) Act, 1956 — Section 9

Citation : (2012) 06 GAU CK 0012

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

**Advocate : R.C. Sencheti, for the Appellant; S.P. Roy, N. Alam, R.P.N. Singh and
Mr. K. Rajbongshi, Advocates For the respondent No.1, for the Respondent**

Final Decision : Allowed

Judgement

Hon"ble Mr. Justice, B.P. Katakey

This appeal by the defendant No.6 is directed against the judgment and decree dated 21st January, 2000 passed by the learned Civil Judge (Senior Division), No.2, Guwahati in Title Appeal No.55/1997 allowing the appeal preferred by the plaintiff thereby decreeing the suit of the plaintiff as against the appellant/defendant No.6 by partly setting aside the judgment and decree dated 30th June, 1997 passed by the learned Civil Judge (Junior Division) No.1, Guwahati in Title Suit No.262/1996 (earlier Title Suit No.149/1989). The respondent No.1 as plaintiff instituted Title Suit No.149/1989 initially in the Court of the Assistant District Judge, No.1 at Guwahati, which suit, however, was subsequently transferred to the Court of the learned Civil Judge (Junior Division) No.1, Guwahati and consequently renumbered as Title Suit No.262/1996, against the present appellant as well as the proforma respondent Nos.2 to 5 praying for the following decree:-

(a) Declaring that the plaintiff is lawful owner of the shares as mentioned in the schedule "A".

(b) Declaration that the plaintiff is entitled to a direction that the defendant No.1 & 2 to cause transfer of the certificates in favour of the plaintiff.

(c) Declaration that the plaintiff is entitled to refund of the money spent in purchase of the shares with 18 p.

(c)1. Interest thereon in case above pray are not granted.

(d) A permanent injunction restraining the defendant No.1 and 2 to make payments of the dividend and instruments of Bonus shares to the defendant No.3 and 4 and mandatory injunction to recall and/or cancel the bonus share if the bonus share is issued by them.

2. During pendency of the suit, an application seeking amendment of the prayer in the plaint was filed by the plaintiff on 6th July, 1993, which was allowed by the learned Trial Judge vide order dated 19th February, 1994. The prayer in the plaint as stood after its amendment reads as follows:-

(a) Declaring that the plaintiff is lawful owner of the shares as mentioned in the schedule A.

(b) Declaration that the plaintiff is entitled to a direction that the defendant No.1 & 2 to cause transfer of the certificates in favour of the plaintiff.

(c) A decree directing the defendant No.1 to cause transfer of the shares as mentioned in the schedule "A" and all bonus share issued against those shares after 18-1-1988 in favour of the plaintiff and to pay all the dividend occurred therein to the plaintiff.

(c)1. In the alternative a decree directing the defendant No.6 to pay to the plaintiff the highest market value of the shares mentioned in the schedule "A" & dividend issued against it till the date payment.

(d) A permanent injunction restraining the defendants No.1 & 2 to make payments of the dividend and instruments of bonus share of the defendant No.3 and 4 and mandatory injunction to recall and/or cancel the bonus share if issued by them.

3. The plaintiff, who was minor and represented by his father and natural guardian, instituted the said suit contending inter-alia that though on 4th February, 1988 he purchased 100 Equity Shares of Brooke Bond India Limited, the defendant No.1, (M/s Brooke Bond India Ltd. subsequently amalgamated with Hindustan Lever Ltd.) under 2(two) share certificates dated 6th December, 1976 and 11th June, 1979 for Rs.8,650/-, of which the defendant Nos.3 and 4, (Mr. Gurudatta Ramarao Yennemadi and Mrs. Sulochana Gurudatta Yennemadi) were the original holders and thereafter, sent the said 2(two) share certificates alongwith the stamp and the signed transfer deeds duly executed by the original

share holders, namely the defendant Nos.3 and 4, to the defendant No.1 on 13th April, 1988 by registered post, which was received by the defendant No.2 (M/s Choksey Bhargava & Co.) on 2nd May, 1988 and acknowledged the receipt thereof, the defendant No.2 on 23rd May, 1988 has informed the plaintiff about refusal to register the transfer on the ground that the validity of the transferred deeds have expired on 21st October, 1987 and the books of the Company were closed on 5th April, 1988. It has also been pleaded that the plaintiff, thereafter, filed an application before the Registrar of the Companies, West Bengal for extension of time for registration of transfer and accordingly time was extended and the plaintiff within the extended period of time again sent the share certificates and the original transfer deeds bearing the stamp and signatures of the defendant Nos.3 and 4 to the defendant No.1 for transfer of the shares in his favour, which document though were received by the defendant No.1 on 3rd April, 1989, i.e. within the extended period of time, the defendant No.1 vide communication dated 20th June, 1989 informed the plaintiff that such transfer cannot be registered as the signatures of the transferor differs from the specimen signatures recorded with the Company. According to the plaintiff, he, thereafter, on 21st March, 1988 and again on 12th August, 1989 requested the defendant No.1 to stop payment of the dividend and the bonus share pending finalization of the transfer but despite that the defendant No.1 made payment to the defendant Nos.3 and 4. It has also been pleaded in the plaint that the plaintiff reasonably apprehends that the documents, namely, the transfer deeds, have been forged during the sale and purchase. The further pleaded case of the plaintiff is that on receipt of the aforesaid communication dated 20th June, 1989 from the defendant No.1, the plaintiff demanded the defendant No.6 refund of the value of the shares as per the current market rate and submitted the bills dated 1st July, 1989 for Rs.15,051/-, apart from claiming Rs.150/- per share and other charges. According to the plaintiff, by the subsequent communication dated 7th August, 1989, he again demanded payment of value of the shares including the bonus and dividend as per the rate for bad delivery and despite that the defendant No.6 failed and neglected to make payment. The plaintiff, therefore, instituted the suit claiming the relief, which have already been noticed above.

4. The suit was contested by the defendant Nos.1 and 6 by filing their respective written statements. The defendant No.6 also filed the additional written statement after amendment of the prayer in the plaint. The other defendants did not contest the suit of the plaintiff. The defendant No.1 in the written statement filed has pleaded that the plaintiff cannot be the lawful holder of the shares in question, as the signatures in the transfer deeds do not tally with the specimen signatures of the share holders, namely the defendant Nos.3 and 4, and maintained by the defendant No.1. It has also been contended that for the said reason, the transfer of shares in favour of the plaintiff could not be recorded and accordingly, the plaintiff was duly informed. The defendant No.1 pleaded that the plaintiff is, therefore, not entitled to any relief claimed against it.

5. The defendant No.6 in the initial written statement filed has also denied the

claim of the plaintiff and contended that the plaintiff has no right to demand from him any refund of the value of the shares as the plaintiff failed to send the share transfer certificates within the time allowed and there being no complain regarding any bad delivery at all lodged, before the Gauhati Stock Exchange where the defendant No.6 is a member, before book closing. In the additional written statement filed after amendment of the prayer in the plaint, the specific plea relating to the suit being barred by limitation has been taken contending that no relief as against him having been claimed by the plaintiff within 3(three) years from the date of submission of the bill dated 1st July, 1989 claiming an amount of Rs.15,051/- and Rs.150/- per share and other charges, the suit of the plaintiff as against the defendant No.6 is barred by time. The defendant No.6 also reiterated the other pleadings made in the earlier written statement filed, apart from denying the claim of the plaintiff in paragraph 13 of the plaint.

6. It is worth to mention here that against the order dated 19th February, 1994 granting the amendment of the prayer in the plaint, the defendant No.6 filed Civil Revision Petition No.175/1994, which was disposed of vide order dated 15th November, 1994 allowing the defendant No.6 to raise the plea of limitation in the suit and directing the Trial Court to decide the said plea, if taken, however, refusing to interfere with the amendment allowed vide order dated 19th February, 1994.

7. The Trial Court on the basis of the pleadings of the parties framed the following issues for consideration and decision:-

1. Whether the suit is maintainable?
2. Whether the plaintiff is lawful owner of the shares mentioned in the Schedule-A of the plaint?
- 3.(a). Whether the defendant No.1 is liable to transfer the share certificates in favour of the plaintiff, and to pay him the dividend and bonus share from the date of purchase of share?
- 3.(b). Whether the defendant No.6 is liable to pay to the plaintiff the highest market value of the shares mentioned in Schedule-A of the plaint, and bonus share and dividend issued against it?
4. Whether the defendant No.1 may be restrained to make payment of the dividend and instrument of bonus share to the defendant 3 and 4?
5. To what other relief the plaintiff is entitled?
6. Whether the suit is barred by law of limitation against the defendant No.6?
8. The plaintiff in support of his claim has examined 1(one) witness and also proved a number of documents. The defendant Nos.1 and 6 though filed their respective written statements, they did not adduce any evidence, however, cross-examined the witness examined by the plaintiff.

9. The learned Trial Judge has dismissed the suit vide judgment and decree dated 30th June, 1997 by holding that the plaintiff is not entitled to the decree claimed, as admittedly the shares have not been transferred in the name of the plaintiff, in view of the fact that the transfer deeds were not proper and the same are alleged to be forged and by virtue of such documents the plaintiff cannot claim to be the lawful owner of the shares in question. The issue relating to the limitation has also been decided against the plaintiff and in favour of the defendant No.6 by holding that the claim of the plaintiff is barred by law of limitation having not claimed any relief as against the defendant No.6 within 3(three) years from the date when the cause of action against the defendant No.6 arose, i.e. on 1st July, 1989, which is the date when the plaintiff claimed an amount of Rs.15,051/- together with Rs.150/- per share and other charges. The issue No.3(b), which relates to the claim of the plaintiff as against the defendant No.6 for realization of the highest market value of the share as well as the bonus and the dividend has also been decided against the plaintiff and in favour of the defendant No.6 on the ground that the claim of the plaintiff is barred by the law of limitation.

10. Being aggrieved, the plaintiff preferred Title Appeal No.55/1997, which was allowed as against the defendant No.6 vide judgment and decree dated 21st January, 2000 by decreeing the suit of the plaintiff declaring that the plaintiff is entitled to get the market price of the shares and bonus and dividend from the defendant No.6, by setting aside the judgment and decree passed by the Trial Court to that extent. The Appellate Court has decided the issue relating to the limitation (issue No.6) in favour of the plaintiff on the ground that though the plaintiff initially did not claim any relief against the defendant No.6 and relief against him has been claimed by way of amendment of the prayer in the plaint on 19th February, 1994, the plaintiff has narrated the claim as against the defendant No.6 in paragraph 13 of the plaint, which has been contested by the defendant No.6 by filing written statement. The learned Judge while deciding the issue No.3(b) though has held that the liability lies with the defendant No.6 to make the bad delivery into good delivery has, however, held that for the failure of that, the plaintiff is not entitled to the claim of higher market value of the shares mentioned in Schedule-A of the plaint and bonus shares and dividend issued against it from the defendant No.6. The learned Judge, however, after holding so has passed the decree that the plaintiff is entitled to get the market price of the shares, bonus and the dividend from the appellant/defendant No.6, which is evidently contradictory.

11. This appeal was admitted for hearing vide order dated 10th November, 2000 on the following substantial questions of law:-

1. Whether the lower appellate court committed illegality in decreeing the suit for highest market value of the shares with dividends and bonus shares despite finding that the respondent plaintiff is not the owners of the shares?
2. Whether the respondent/plaintiff has got any right to recover any amount

from the appellant/defendant under the Securities Contracts (Regulation) Act, 1956?

3. Whether under Sections 108, 108B, 110 and 111 of the Companies Act, 1956 the appellant/defendant not being the transferor of the shares has got any liability to refund the price of the shares?

4. Whether the decision of the learned lower appellate court on the point of Limitation can be sustained?

12. I have heard Mr. R.C. Sencheti, learned counsel for the appellant/defendant No.6 and Mr. S.P. Roy, learned counsel appearing for the respondents/plaintiff. None appears for the other respondents.

13. Mr. Sencheti, learned counsel for the appellant/defendant No.6 referring to paragraph 14 of both the amended and un-amended plaint has submitted that it is evident therefrom that according to the plaintiff himself, the cause of action for filing the suit claiming the relief as against the defendant No.6 arose on 1st July, 1989 and the plaintiff having not prayed for any relief in the plaint initially filed, the claim of the plaintiff as against the appellant/defendant No.6, as introduced by the amendment made vide order dated 19th February, 1994, is barred by time, the claim having been made after expiry of 3(three) years from the date when cause of action arose, i.e. 1st July, 1989, and hence the First Appellate Court ought not to have disturbed the finding recorded by the Trial Court with regard to the issue No.6. According to the learned counsel, the First Appellate Court did not consider the said aspect of the matter at all. The learned counsel referring to the finding recorded by the First Appellate Court against the issue No.3(b) has also submitted that the learned Judge having found that for the failure of the defendant No.6 to make the bad delivery into good delivery, the plaintiff is not entitled to claim the higher market value of the shares mentioned in Schedule-A of the plaint and also the bonus and dividend from the defendant No.6, ought not to have passed the ultimate decree declaring that the plaintiff is entitled to get the market value of the shares, bonus and dividend from the defendant No.6, the same being contrary to the finding recorded by the learned Judge against the issue No.3(b).

14. The learned counsel referring to Bylaws 154 of the Byelaws of the Gauhati Stock Exchange Limited also submits that the appellant/defendant No.6, who is a member of the said Stock Exchange, is not personally liable for any defective transfer deeds, as those transfer deeds were not lodged with the defendant No.1 within the time prescribed by law. It has also been submitted that though the plaintiff in the plaint has pleaded that he apprehends forgery of the transfer deeds, there is no pleading relating to the forgery by the defendant No.6 and no evidence has also been led to that effect, though burden heavily lies on the plaintiff to prove the same. The learned counsel, therefore, submits that the judgment and decree passed by the First Appellate Court needs to be set aside.

15. Mr. Roy, learned counsel appearing for the respondent No.1/plaintiff, on the

other hand, supporting the judgment and decree passed by the First Appellate Court submits that the claim of the plaintiff as against the appellant/defendant No.6 is not barred by law, as the plaintiff in paragraph 13 of the original plaint has narrated his claim as against the defendant No.6. Referring to Section 6 and Section 21 of the Limitation Act, 1963, Mr. Roy, learned counsel further submits that since on the date of institution of the suit, the plaintiff was a minor, the period of limitation relating to his claim as against the defendant No.6 would commence from the date when he attained the age of majority, about which the plaintiff has informed the Trial Court vide application dated 21st July, 1995. It has further been submitted by Mr. Roy that the suit of the plaintiff, in view of Section 6(1) of the Limitation Act is deemed to be instituted on the date when he attains the age of majority, which is sometimes in the year 1994. Referring to Section 22 of the Limitation Act, the learned counsel further submits that since the claim of the plaintiff as against the defendant No.6 is for a continuing breach of the contract, a fresh period of limitation begins to run at every moment of the time during which the breach continues and as such, the suit of the plaintiff as against the defendant No.6 is rightly held as not barred by law of limitation.

16. Mr. Roy, with regards to the finding recorded by the First Appellate Court against issue No.3(b) and also the decree passed in the appeal, has submitted that it is evident from the discussions made against the issue No.3(b) that the word "not" has been inadvertently put thereby giving a different meaning as the First Appellate Court has held that the defendant No.6 is to make the bad delivery into good delivery. Referring to the Byelaws of the Gauhati Stock Exchange Limited, more particularly, Bylaw Nos.158, 159 and 162, it has also been submitted by Mr. Roy that the defendant No.6 being the selling member of the Gauhati Stock Exchange, is responsible for the defective documents and also is responsible for refund of the money and as such, the First Appellate Court has rightly passed the decree, which has been put to challenge in the present appeal.

17. I have considered the submissions of the learned counsel for the parties and also perused the judgments and decrees passed by the Courts below.

18. Having regard to the contentions of the learned counsel for the appearing parties and the substantial questions of law formulated, the decision of the First Appellate Court against the issue Nos.3(b) and 6 assumes importance. It may be mentioned at this stage that though the suit of the plaintiff was dismissed by the Trial Court in its entirety and the First Appellate Court also did not pass any decree as against the defendant Nos.1 to 5, the plaintiff did not file any appeal against the judgment and decree passed by the First Appellate Court.

19. As noticed above, the suit was filed by the plaintiff/respondent on 16th August, 1989 initially claiming the relief against the defendant Nos.1 to 4 only. The plaintiff in paragraph 13 of the plaint though has pleaded that he demanded the appellant/defendant No.6 refund of the value of the shares as per the current market rate and submitted the bill on 1st July, 1989 for Rs.15,051/- and Rs.150/- per share and other charges, which the defendant No.6 failed and

neglected to pay, did not, however, claim any relief against him in the initial plaint filed. The relief claimed as against the appellant/defendant No.6 was introduced by way of amendment to the plaint, which was allowed vide order dated 19th February, 1994, praying for a decree, in the alternative, directing the defendant No.6 to pay to the plaintiff the highest market value of the shares mentioned in Schedule-A and dividends issued against it till the date of payment. The other prayers as well as the averments made in the plaint remain same as there was no amendment sought for and granted in that respect.

20. In paragraph 14 of the plaint, the respondent No.1/ plaintiff has stated about the dates when the cause of action for filing the suit arose. According to the plaintiff, the cause of action arose on 4th February, 1988, when the plaintiff purchased the shares; on 23rd May, 1988 and 20th June, 1989, the dates of declaring the transfer documents as defective; on 18th July, 1989 the recorded date for the bonus share; on 1st July, 1989, the date of bill given by the plaintiff to the defendant No.6 demanding payment for the bad delivery. In the said paragraph, it has also been pleaded that the cause of action arose also on subsequent dates, without, however, mentioning any specific date.

21. The relief claimed against the appellant/defendant No.6 relates to the cause of action, which, according to the plaintiff, arose on 1st July, 1989, i.e. the date of the bill by which according to the plaintiff, he has claimed an amount of Rs.15,051/- from the defendant No.6 and Rs.150/- per share and other charges. Hence, according to the plaintiff, the cause of action for claiming the relief as against the defendant No.6 is based on the bill dated 1st July, 1989 and not on the basis of any contract between the plaintiff and the defendant No.6. The plaintiff though in paragraph 10 of the plaint has pleaded that because of the circumstances narrated in the foregoing paragraphs of the plaint, there is reasonable apprehension of the documents, viz. the transfer deeds being forged during the process of sale and purchase, nothing specific, however, has been imputed against the appellant/defendant No.6. There is also no pleading in the plaint who has forged the transfer deeds. It is a settled position of law that when the allegation of forgery is made, the burden heavily lies on the person making such allegation to prove such forgery. No amount of evidence has also been laid to prove any forgery against the appellant/defendant No.6.

22. The claim of the plaintiff/respondent against the appellant/defendant No.6 being based on the bill dated 1st July, 1989 claiming an amount of Rs.15,051/- and Rs.150/- per shares apart from other charges, the suit has to be instituted claiming the said relief against the defendant No.6 within 3(three) years from the date of the bill. In the instant case, as noticed above, though in paragraph 13 of the plaint, the plaintiff has stated about raising such bill, no claim initially was made against the appellant/defendant No.6, which claim, however, has been introduced to the plaint on 19th February, 1994, i.e. beyond the period of limitation of 3(three) years. Mere pleading in the plaint by the plaintiff about making such demand without the relief claimed as against the appellant/

defendant No.6 would not save the limitation. The crucial date for determining the question of limitation is the date when the plaint was amended by introducing the relief claimed as against the appellant/defendant No.6, i.e. 19th February, 1994. The contention of the learned counsel appearing for the respondent/plaintiff that the fresh period of limitation would start from the date when the minor plaintiff has attained the age of majority, in view of Section 6(1) read with Section 21 of the Limitation Act, 1963, cannot be accepted for the simple reason that the plaintiff, who is a minor, has already instituted the suit through his father and natural guardian and he also did not attain the age of majority on the date when the amendment of the prayer in the plaint was allowed. Section 22 of the said Act is also not attracted in the case in hand, as the plaintiff's claim against the defendant No.6 is not for breach of any contract but for failure to pay the amount as demanded by the bill dated 1st July, 1989. The suit of the plaintiff/respondent, therefore, is barred by time. The First Appellate Court while allowing the appeal preferred by the respondent/plaintiff did not consider this aspect of the matter.

23. Having held so, though it is not required to go into the question as to whether the appellant/defendant No.6 is liable to pay any amount to the respondent/plaintiff, i.e. the issue No.3(b), it appears that the First Appellate Court has recorded a clear finding that failure of the defendant No.6 to make the bad delivery into good would not entitle the plaintiff to claim the higher market value of the shares mentioned in Schedule-A of the plaint and the bonus shares and dividends issued against it from the defendant No.6. Having recorded such finding, the First Appellate Court ought not to have decreed the suit of the plaintiff as against the defendant No.6. The submission of the learned counsel for the respondent/plaintiff that the word "not" was inadvertently put to give a negative meaning cannot be accepted. The respondent/plaintiff neither filed any application seeking review nor prefer appeal against such finding. It also appears from the Exhibit-1, which is the basis for recording the finding by the First Appellate Court that as the defendant No.6 was the seller for value and the plaintiff was the purchaser for value, the liability lies with the defendant No.6 to make the bad delivery into good delivery, that by that document an amount of Rs.8,650/- was realized by the defendant No.6 from one Raichand Bhuria, towards the cost of 100 shares of Brook Bond. The name of the plaintiff appeared in the said document was, however, subsequently penned through and in his place the name of Raichand Bhuria was mentioned. Admittedly the defendant No.6 is not the owner of the shares and he was only the broker and hence there was also no relationship of seller and the buyer between the defendant No.6 and the plaintiff. The reference made by the learned counsel for the parties to the Byelaws of the Gauhati Stock Exchange Limited, of which the defendant No.6 admittedly is a member, cannot be taken note of as nothing could be placed on record to demonstrate that the said Byelaws was approved either by the Central Government or by the Securities and Exchange Board of India and published in the Gazette of India as well as in the official Gazette of the State, as required u/s

9 of the Securities Contracts (Regulation) Act, 1956.

24. In view of the aforesaid discussion, I am of the view that the plaintiff's suit must fail. Hence, the impugned judgment and decree dated 21st January, 2000 passed by the First Appellate Court is set aside by affirming the judgment and decree passed by the Trial Court, for the reasons recorded above.

25. The appeal is accordingly allowed. The parties are directed to bear their own costs. Registry is directed to send down the records.