
(1965) 05 P&H CK 0048

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 101 of 1962

S.K. Shankara, Official Liquidator

APPELLANT

Vs

Sardar Haridhan Singh and Others

RESPONDENT

Date of Decision : 26-05-1965

Acts Referred:

Companies Act, 1913 — Section 184, 38
Limitation Act, 1908 — Article 120 , 181

Citation : (1966) 36 CompCas 209

Hon'ble Judges : S.S. Dulat, J;A.N. Grover, J

Bench : Division Bench

Advocate : D.D. Khanna, H.L. Sibal and D.S. Nehra, for the Appellant; B.R. Tuli and S.K. Tuli for respondent No. 1 and D.N. Aswathy, for the Respondent

Final Decision : Allowed

Judgement

A.N. Grover, J.—This is an appeal under Clause 10 of the Letters patent against a judgment dated the 6th February, 1962 Official Liquidator, People's Insurance Co. Ltd. v. Sardar Haridhan Singh [1962] 32 Comp. Cas. 636, of the learned company judge, by which an application u/s 184 read with Section 38 of the Indian Companies Act, 1913 (hereinafter called the Act), filed by the official liquidator of the People's Insurance Company Limited (in liquidation) praying for rectification of the register of members of the aforesaid company in respect of 3045 shares had been dismissed.

2. Certain facts are not in dispute. A large number of shares stood in the name of Sardul Singh Caveeshar, deceased. On the 30th September, 1940, such 3045 shares were acquired by respondent No. 1, Haridhan Singh, from Sardul Singh Caveeshar. At the time of transfer these shares were only 10 per cent. paid. Subsequently respondent No. 1 acquired more shares and his total holding came to be 4299 shares. Respondent No. 1, Haridhan Singh, became chairman of the company in 1940, and he, was appointed as managing director in 1943. He acted as such till the end of December, 1945. Thereafter, he continued as a director till

16th March, 1946. By 25th March, 1946, respondent No. 1 had transferred 1254 shares and thus a block of 3045 shares remained in his name. Two more calls of Rs. 10 per share each were made before 24th March, 1946, but these were not paid by respondent No. 1 with the result that on 23rd July, 1946, he was liable to payment of arrears of calls in the sum of Rs. 60,900. On 23rd July, 1946, the company forfeited all the shares (3045) which stood in the name of respondent No. 1. According to the allegations contained in the application u/s 184 and Section 38 of the Act, which was filed by the official liquidator in April, 1958, the forfeiture of the shares belonging to respondent No. 1 was the result of collusion between him and Sardul Singh Caveeshar and his friends in the company who adopted the device of forfeiting the shares so that respondent No. 1 may not have to pay the amount of the call money, which was payable by him amounting to Rs. 60,900. The case of the liquidator also was that, after the fraudulent and collusive forfeiture, the entire block of 3045 shares was fictitiously re-allotted to Manphool Singh Sharma, respondent No. 2, " who was an active accomplice and the most trusted lieutenant of Sardul Singh Caveeshar. " It is alleged that Manphool Singh Sharma was employed in one of the concerns of Sardul Singh Caveeshar. It was further pleaded that the entire uncalled liability in respect of the aforesaid shares aggregating to Rs. 2,13,150 was shown as paid to the company " by cooking up an advance or loan entry from the company's funds to Smt. Sharbati Devi, wife of Ram Rup Sharma, and sister of Manphool Singh Sharma. " Details were then given of what was described as " bogus transfers of 2615 shares (out of the lot of 3045 shares) ", which were transferred in favour of various persons mentioned in paragraph 10 of the petition. The case of the liquidator, therefore, was that the forfeiture of 3045 shares and their reallocation was the result of a conspiracy entered into between respondent No. 1, Haridhan Singh, Sardul Singh Caveeshar, Manphool Singh Sharma and Ram Rup Sharma to deprive the company of its legal rights of recovering Rs. 2,74,050 from respondent No. 1. The prayer was for rectification of the register by restoring 3045 shares to the name of respondent No. 1 and for removal of the names of respondents Nos. 2 to 9, who were shown to be the holders of these shares, from the register. It may be mentioned that, according to the liquidator, before this application was filed, he had applied for settlement of the list of contributories (Civil Original No. 7 of 1957). Respondents Nos. 2 to 9 were shown as contributories at serial Nos. 53, 35, 43, 46, 44, 45, 47 and 54, respectively. As a result of further investigation by the official liquidator, all the above facts, which were then set out in the application filed u/s 184 and Section 38 of the Act, came to light.

3. In his written statement respondent No. 1 denied all the allegations made against him by the official liquidator. It was admitted that 3045 shares in question were held by Sardul Singh Caveeshar, but, according to respondent No. 1, these shares were transferred benami in his name. Most of the other facts which have been set out in the beginning of the judgment were admitted, but the case of respondent No. 1 was that he handed back the entire holding to Sardul

Singh Caveeshar and then severed his connection with the company in March, 1946. At all relevant times these shares were the property of Sardul Singh [Caveeshar, and respondent No. 1 says that he had no concern with them. The allegations relating to collusion and fraud were denied. It was also pleaded that call-money had not been paid because the shares were really the property of Sardul Singh Caveeshar.

4. On these pleadings the learned company judge framed the following issues ;

" (1) Whether respondent No. 1 is not liable for the payment of the calls made during the period he was the registered holder of the shares in dispute ?

(2) Did respondent No. 1 ever surrender the shares in dispute to Sardul Singh Caveeshar and was the forfeiture and reallotment thereof bona fide and not collusive ?

(3) Were the payments of subsequent calls as shown in the books of the company invalid, fraudulent and ultra vires and of no effect ?

(4) Is respondent No. 9 a bona fide transferee and what is its effect ?

(5) Relief. "

5. On 22nd July, 1960, another additional issue was added:

" (4A) Whether the petition is within time ? "

6. The learned company judge referred to the evidence led by the parties including the letters of Sardul Singh Caveeshar produced by respondent No. 1 to show the benami nature of holding of shares. Without expressing any final opinion the learned judge said that it could not be definitely gathered that the shares were really of Sardul Singh Caveeshar, though the suggestion to the contrary could not be entirely ruled out. After referring to the arguments of the counsel for the liquidator the learned judge proceeded to consider the question of limitation which had been raised before him on behalf of respondent No. 1. The submission made before him was that the consequence of non-payment of calls was that either the company should have sued for the recovery of the call-money within three years under Article 112 of the Limitation Act, or it could forfeit the shares and also sue for outstanding calls and in that case the period of limitation would be three years from the date of forfeiture under Article 115. After referring to a Bombay decision, *Dhanraj Keshrimal Jhalani v. H.H. Wadia* [1933] 3 Comp. Cas. 462 the learned judge observed as follows *Official Liquidator, People's Insurance Co. Ltd, v. Sardar Haridhan Singh* [1962] 32 Comp. Cas. 636 641, 642:

"Under Article 181, the period provided for seeking annulment of forfeiture is three years and in this case the application was made twelve years later. The application is no doubt barred by time and the bar of limitation can be lifted on proof of fraud. "

7. The question of fraud was then examined and the conclusion of the learned

judge may be stated in his own words :

" After giving my anxious consideration to the arguments advanced by the learned counsel for the parties, I am not satisfied that fraud has been brought home to respondent No. 1. The circumstances of this case--the position of respondent No. 1 in the company as the chairman and director, his cordial relations with S. Sardul Singh, his failure to pay the two calls and the incredible statement made by him, though then the managing director of the company, that he was not aware of the calls having been made on these shares--do raise a strong suspicion of his having been a party to the fraud. But in order to establish fraud, the standard of proof required is not satisfied by merely raising suspicion howsoever strong. One important fact in this case is that although the company was ordered to be wound up on 29th May, 1955, the present application against respondent No. 1 was made on 30th April, 1958. There is nothing forthcoming on the record that the official liquidator had been kept in the dark with respect to this matter. Under these circumstances, the bar of limitation stands in the way of the official liquidator and it has not been overcome by a definite proof of fraud on the part of respondent No. 1. "

8. It is apparent that the petition of the liquidator was decided more or less on the finding on issue No, 4-A that it was barred by limitation, and no firm decision was given on the other issues. According to Mr. D.D. Khanna, the learned judge had applied Article 181 of the Limitation Act, and he has strenuously contended that that article was not applicable. It seems to me that so far as the applicability of Article 181 is concerned, the matter stands concluded by pronouncement of their Lordships in *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, In that case the facts are somewhat complicated, but for our purpose it is only necessary to state that a private limited company was ordered to be wound up on 16th February, 1945, and the official receiver was granted leave on 21st January, 1946, to take appropriate steps regarding 5,000 shares which the company held in Jawahar Mills Limited, and which had been forfeited by the mills. On 5th March, 1946, the official receiver in the name of the company took out summons calling upon all parties concerned to show cause why the share register of the mills should not be rectified by restoring the name of the company to the said register in respect of 5,000 shares. This petition was opposed by the mills, who pleaded, inter alia, that the shares had been properly forfeited and also set up the bar of limitation. Their Lordships noticed the preponderating view of most of the High Courts that Article 181 governed only applications under the Code of Civil Procedure. Reference was also made to a decision of the Privy Council in *Hansraj Gupta v. Official Liquidators, Dehra Dun Mussourie Electric Tramway Co.* [1933] 3 Comp. Cas. 207 (P.C.) in which the question of applicability of Article 181 to proceedings under the Companies Act arose. The Privy Council appeared to approve of the decisions in which the view had been taken that Article 181 only related to applications under the Code of Civil Procedure, but that case was decided on the assumption that even if Article 181 applied, the application made by the liquidator was within time. Their Lordships

of the Supreme Court then proceeded to observe [1953] 23 Comp. Cas. 1, 16 (S.C.):

" It does not appear to us quite convincing, without further argument, that the mere amendment of Articles 158 and 178 can " ipso facto" alter the meaning which, as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in article 181. This long catena of decisions may well be said to have, as it were, added the words " under the Code " in the first column of that article. If those words had actually been used in that column then a subsequent amendment of Articles 158 and 178 certainly would not have affected the meaning of that article. If, however, as a result of judicial construction, those words have come to be read into the first column as if those words actually occurred therein, we are not of opinion, as at present advised, that the subsequent amendment of articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded is no longer available. "

9. On the view expressed in this case it is difficult to say that the present application would be governed by Article 181 of the Limitation Act. It may be mentioned that in the above case their Lordships held that the application of the official receiver was not barred by limitation even if Article 181 applied, and further observed that if Article 181 did not apply then the only article which could be applied by analogy was Article 120 and the application was within time. In their view the application in that case could not be thrown out as barred by limitation.

10. The learned counsel for respondent No. 1 contends that in *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, the Supreme Court held that even if Article 181 did not apply, Article 120 would be applicable. Their Lordships did examine the bar of limitation in that case from the point of view of applicability of Article 120 also, but it is difficult to hold that any decision was given that such an application would be governed by Article 120. The application in that case for setting aside the forfeiture had been made without much delay, and, therefore, the application could be held to be within time whether Article 181 or Article 120 applied. One matter, however, was clearly laid down that time would begin to run under Article 120 only after knowledge of the transaction.

11. In order to fully understand the decision in *Hansraj Gupta v. Dehra Dun Mussourie Electric Tramway Co. Ltd.* reference must be made to *Hansraj Gupta v. N.P. Asthana* [1932] 2 Comp. Cas 148 (P.C.). One Raghu Mal was a shareholder in a company named the Dehra Dun Mussourie Electric Tramway Co. Ltd. In 1922 he entered into a contract with the company by which he agreed to supply large quantities of tramway construction material to it. A sum of Rs. 27,000 was paid to him by the company by way of advance. Raghu Mal applied for more shares of the company. On payment of the allotment moneys the shares were duly allotted to him. The company having failed to perform its obligation under the contract

entered into by it with him, Raghu Mal filed a suit claiming damages and other reliefs in respect of the breach of the contract. Before the suit came up for trial, the company was ordered to be wound up with effect from 29th January, 1926. The testator having died, the official liquidators of the company served a notice on his executors seeking to include them in the list of contributories in respect of the shares held by Raghu Mal deceased. The official liquidator filed applications for recovering from the executors the amounts of Rs. 27,000 and Rs. 35,000 and another item of Rs. 7,703-13-0 which were shown in the books of the company as debits against Raghu Mal. The trial court held that the liquidators were entitled to recover these amounts. All these debts were held to be within time. The executors had also filed an application that their names might be removed from the list of contributories with regard to the shares in question and claiming payment of Rs. 31,250 paid as allotment moneys. It is unnecessary to state the pleas on which this contention was founded. That application was dismissed as having not been filed within the time prescribed by the Rules of the Allahabad High Court. The question which came up for consideration in *Hansraj Gupta v. Official Liquidators, Dehra, Dun Mussourie Electric Tramway Co. Ltd.* was whether the three sums of Rs. 27,000, Rs. 35,000 and Rs. 7,703-13-0 were recoverable. Their Lordships proceeded to consider the question of limitation and referred to Section 3 of the Limitation Act and observed that unless the application which the liquidators made for recovery of these amounts was a "suit instituted" or an "application made" within Section 3, no question of limitation in regard thereto could arise. Section 2 of the Act contained the definition of suit, it being that unless there is anything repugnant in the subject or context, "suit" does not include an appeal or an application. In this connection their Lordships proceeded to say that the word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint. They were of the view that the application of the liquidators could not be dismissed as being a "suit instituted" after the prescribed period of limitation. The application was, therefore to be treated as an "application made" u/s 3 and the next question to be enquired into was whether any period of limitation was prescribed therefore by Schedule I of the Limitation Act. It was common ground before their Lordships that the only article which could apply to such an application would be Article 181 but that article was held not to be applicable owing to the preponderance of authorities that it only related to applications under the Code of Civil Procedure. The conclusion arrived at, therefore, was:

"The result is that from either point of view the application by liquidators, if otherwise properly made under and within the provisions of Section 186, Indian Companies Act, is not one which must be dismissed by reason of Section 3, of the Indian Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed. The case may be a *casus omissus*. If it be so, then it is for others than their Lordships to remedy the defect."

12. Their Lordships then examined another aspect of the case which was most important and that was whether the three sums which the liquidators sought, by their application, to recover were at the date of that application " money due " within the meaning of Section 186. If they were not due then the section had no application and the court could have had no power to make the order which it did. Each item was then examined and it was held that the money must be due and recoverable in a suit by the company and if the debt was time-barred, it could not be enforced by a summary order u/s 186, the reason being that the section did not create new liabilities or confer new rights, but merely prescribed a summary procedure for enforcing existing liabilities. It was, therefore, held that since all the three sums were debts which were barred by time when the application was made by the official liquidator for the recovery, there was no power in the court u/s 186 of the Act to order payment to the liquidators of any of the three items in question.

13. Now, counsel for both sides in the present case have relied on the above decision in support of their respective contentions. On behalf of the official liquidator it has been submitted that Article 131 of the Limitation Act could not be held to be applicable and also that the present application made u/s 184 of the Act would not be a suit so as to attract the applicability of Article 120 of the Limitation Act. The learned counsel for respondent No. 1 says that the rule which was " prominently in the mind of their Lordships that if certain amount was not recoverable in a suit the recovery could not be enforced by a summary order u/s 186 of the Act, would be applicable here also. It is pointed out that, if a suit for rectification of the register had to be filed, it would be governed by Article 120 and it is urged that it could not possibly be held that merely because resort is to be had to the summary remedy provided by Section 38 of the Act for rectification the bar of limitation would " be eliminated. It is suggested that this would lead to most anomalous consequences inasmuch as if rectification of a register is sought u/s 38 and it is held that there is no period of limitation prescribed for the same but if the court directs that owing to the complicated nature of the points involved a suit should be filed then the bar of limitation would operate and the court would have to dismiss the suit if it is beyond time under Article 120 of the Limitation Act. There is a good deal of force in the submissions made by the learned counsel for respondent No. 1 but the real "difficulty is created by two considerations. The first relates to the real and true nature and character of the proceedings taken u/s 184 of the Act. Can it be said that they are the same as u/s 38 ? It will be useful to set out Section 184 (1):

"" As soon as may be after making a winding up order, the court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company, to be collected and applied in discharge of its liabilities. "

14. This section, therefore, can be utilised only after a winding up order has been made when the court has to settle the list of contributories. Section 38 is the

general section conferring power on the court to rectify the register. It can well be argued, as indeed it has been argued before us" on behalf of the official liquidator, that even if Article 120 of the Limitation:" Act governs an application u/s 184, the cause of action would only arise when the winding up order is made whereas u/s 38 the cause of action would arise in the present case when the forfeiture was ordered by the director of the company before liquidation. The second point for consideration is whether an application u/s 184 would be a suit because in that event alone it would be governed by Article 120 of the Limitation Act. According to the plain language of Section 3 of the Limitation Act, read with Section 2(10), and keeping in mind the observations in *Hansraj Gupta v. Official Liquidators, Dehra Dun Mussourie Electric Tramway Co. Ltd.*, that the word " suit " ordinarily means a civil proceeding instituted by the presentation of a plaint, it is difficult to hold that such an application, as was made in the present case, would be a suit. The learned counsel for respondent No. 1 has argued that all original proceedings in the High Courts would be suits and he has relied on the observations of Mahajan J. (as he then was) in *Province of Bombay Vs. Kusaldas S. Advani and Others*, that the expression " sue " means "the enforcement of a claim or a civil right by means of legal proceedings " and when a right is in jeopardy, then any proceedings that can be adopted to put it out of jeopardy fall within the expression "sue ". A writ of certiorari would, therefore, fall within the expression " sue " used in Section 176, Government of India Act, 1935. These observations, however, were made in quite a different context as the learned judge was of the view that a writ of certiorari would lie against the Government of Bombay because Section 306, read with Section 176 of the Government of India Act, 1935, expressly preserved the right to sue in all cases where such a right could be exercised as against the East India Company. It is true that the Supreme Court in *Sha Mulchand's* case did not completely negative the applicability of Article 120 to an application for rectification of the register u/s 38 of the Act but, as has been pointed out before, no decision was given in the matter and although the question is not free from difficulty, I am inclined, as at present advised, to the view that Article 120 would not be applicable to an application which cannot be called a suit and even if that article is applicable, the cause of action would arise only from the date of the order of the winding up of the company because the liquidator could ask for settlement of list of contributories only after the winding up had been ordered and it is at that stage that he can invoke u/s 184 the power of the court to rectify the register of members. In my opinion, the intention to specifically confer the power to rectify the register at the stage of settlement of list of contribu-tories was with a very salutary object in view, namely, to enable the liquidator to take necessary steps in the matter of rectification when either due to fraud or collusion no one has made an application for rectification u/s 38 before the winding up of the company, I do not, however, propose to decide the matter finally as the question of the applicability of Article 120 of the Limitation Act will become almost academic if it is found that respondent No. 1 was guilty of fraud in respect of the forfeiture of the shares in question--a matter about which the learned single judge had a

strong suspicion but with regard to which he could not give a definite finding owing to the nature of the evidence led before him.

15. It has been strenuously contended on behalf of the official liquidator that the learned judge placed the burden of proof of issues 1, 2 and 4 on respondent No. I and for that reason the necessary evidence was not led by the official liquidator but that while deciding the case the learned judge has dealt with the case as if the burden of proof was on the official liquidator. There is a good deal of force in this submission as also in what has been pointed out further by the counsel for the official liquidator that the learned judge did not give findings on all the issues which it was necessary to do in order to decide the entire controversy between the parties.

16. For these reasons, the appeal is allowed and the order of the learned single judge is set aside. The case shall now go back to a learned single judge for a fresh decision after re-casting the issues, if necessary, and after allowing the parties to lead such fresh evidence as may be desired to be produced in order to completely dispose of all the points in issue between the parties. The costs of the appeal shall abide the event.

Dulat, J.

17. I agree.