

(1968) 03 CAL CK 0014
In the Calcutta High Court
Case No : Appeal No. 103 of 1967

Stadmed Private Ltd. and Others

APPELLANT

Vs

Kshetra Mohan Saha and Others

RESPONDENT

Date of Decision : 08-03-1968

Acts Referred:

Companies Act, 1956 — Section 397, 398, 399(1)

Citation : AIR 1968 Cal 572 : 72 CWN 601

Hon'ble Judges : S.K. Mukherjea, J;A.N. Ray, J

Bench : Division Bench

Advocate : R. Choudhury, S.C. Sen and S.B. Mukherji, for the Appellant; B. Das, A.K. Sen and Tapas Banerji, for the Respondent

Final Decision : Allowed

Judgement

Ray, J.—This appeal is from the order of the Companies Tribunal dated 14th March, 1967.

2. The appeal is u/s 10(d) of the Companies Act which provides that an appeal shall lie to the High Court out of any decision, finding or order of the Tribunal only on questions of law.

3. The order of the Companies Tribunal was made on the application of Kshetra Mohan Saha and Sridhar Sikdar dated 26th May 1966 under Sections 397, 398 and 403 of the Companies Act. The reliefs which were asked for were, inter alia, that Amarendra Lal Das, Sujata Saha, Ranendra Lal Das and Sushil Kumar Roy be removed forthwith from the Board of Directors and injunction do issue restraining the said persons from operating the bank-accounts of the company and also restraining them from terminating or suspending or transferring services of the employees of the company. The further reliefs asked for were that a Special Officer be appointed forthwith to take charge of any conduct and run the business and that a Receiver be appointed to take charge of the books of account

4. Kshetra Mohan Saha, Satchidananda Sikdar and Mohit Kumar Pal started a

business of medicine research institute in co-partnership in the year 1942 for manufacture of medicine Gour Gopal Saha was an employee there at ft salary of Rs. 250 per month On 31-10-1946 Standard Medical Research Institute Ltd. was formed to take over the business of partnership. Kshetra Mohan Saha was appointed the Scientific Director for life and Gour Gopal Saha became one of the managing directors. In the year, 1948 Sridhar Sikdar purchased ten ordinary shares in Standard Medical Research Institute Ltd. paying the full value of Rs. 1000. On 2nd May 1951 Sridhar Sikdar purchased five hundred ordinary shares and paid the value of Rs. 50,000 to the company Thereafter Sridhar Sikdar sold the five hundred shares to GOUR Gopal Saha On 22nd September, 1951 Standard Medical Research Institute Ltd became Stadmed Private Ltd. In the month of January, 1952 Gour Gopal Saha purchased two hundred shares in the name of Ranendra Lal Das and the said two hundred shares were transferred to Sujata Saha In the month of October. 1955 Kshetra Mohan Saha was appointed Scientific Director of Stadmed Private Ltd. for nineteen years. In the month of April 1956 the company terminated its agreement with Stadmed Private Ltd. as its district sole agent. In the month of April, 1959 Sujata Saha became a director of the company. This, in short, is the background of the present litigation

5. It is now necessary to refer to certain facts which are in controversy in the present appeal. On 28th April, 1959 Sridhar Sikdar presented a petition to this Court for rectification of share register as his name was removed from the register, On 10th September 19(sic)9 there was an order relegating the parties to a suit. In the year 1959, suit No. 388 of 1959 was filed in the City Civil Court, and on 29th March, 1963 there was a decree and Sridhar was declared owner of the ten shares and there was a decree for rectification On 23rd May, 1966 there was a board-meeting of the company when further shares were issued. On 26th May, 1966 the petition forming the subject-matter of the appeal was filed under Sections 397 and 398 of the Companies Act. On 18th June, 1966 the register of the Company was rectified and the name of Sridhar Sikdar was inserted. I have referred to these facts because of the controversy between the parties as to whether Sridhar Sikdar is a person who has a right to apply u/s 397, of the Companies Act. The controversy, in short, is that it is alleged by the company that only a member has the right to apply and Sridhar Sikdar was not a member in the date of the petition whereas the contention on behalf of the respondent Sridhar Sikdar is that he has a right to apply u/s 397 because he has been declared to be the owner of the shares and there was an order for rectification of the shares and, therefore, he was a member.

6. It is now necessary to refer to certain facts in relation to the other applicant Kshetra Mohan Saha. The controversy as to the right of Kshetra Mohan Saha to apply also turns on Ss 397 and 399 of the Companies Act. The provision contained in Section 399 is that the members if a company shall have a right to apply provided that the applicant or applicants have paid all calls and other sums due on their shares Kshetra Mohan Saha is admittedly a member and it is also an admitted feature of the case that shares in respect of which he is the owner are

not fully paid up. On 16th May 1966 there was a resolution of the Board of Directors of the company calling up Rs. 25 per share. The resolution of the company was that payment was to be made by 29th June, 1966 failing which interest would be charged at twelve per cent. On 23rd May, 1966 letter of call was issued by the company. On 25th May, 1966 letter was received by Kshetra Mohan Saha. The petition forming the subject matter of the appeal was filed on 26th May 1966. Admittedly on the date of the presentation of the petition the call was not paid but was paid later on. It is, therefore, said that Kshetra Mohan Saha did not pay call due on his shares and, therefore, he is not a person entitled to apply u/s 397 of the Companies Act. On the other hand it is contended on behalf of Kshetra Mohan Saha that though the company made a call of shares on 16th May, 1963, the call would not be due until 29th June, 1966 which was the date by which payment was to be made and, therefore, Kshetra Mohan Saha did not commit any violation of the provisions of the Act.

7. Before the Companies Tribunal two preliminary issues were framed first, whether the petition is maintainable on the ground that it did not satisfy the requirements of Section 399(1)(a) of the Companies Act, 1956 and secondly, whether the allegations in the petition related to past acts or conduct in relation to the affairs of the company several years before the presentation of the petition and whether there was no allegation of any present and continuing wrong and mismanagement so as to make it not maintainable u/s 398 of the Act.

8. I shall first deal with the contention as to whether Kshetra Mohan Saha has a right to apply u/s 397 of the Companies Act. Under the provisions contained in Sub-section (1) of Section 399 of the Companies Act the following members of a company shall have a right to apply u/s 397 or 398 of the Companies Act;

(a) In the case of a company having a share capital, not less than one hundred members of the company, or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares:

(b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members.

9. Counsel for the appellant relied on Articles 20, 21 and 22 of the company which are as follows:

Article 20: Subject to any special condition on the allotment of shares all calls on shares shall be made by and at the direction of the directors, and shall be at such times and places and by instalments or otherwise as the directors may appoint;

Article 21: Whenever any call is made. 30 days notice in writing shall be sent to every person liable to pay the same specifying the time and place of appointment and to whom such calls are to be paid:

Article 22: A call shall be deemed to have been made at the time when the resolution in a meeting of the Board of Directors authorising such call is passed, A call may be revoked or postponed at the discretion of the Board;

10. Article 20 relates to calls on shares, Article 21 relates to notice of call and Article 22 is of great importance inasmuch as Article 22 states that a call shall be deemed to have been made at the time when the resolution of the meeting of the Board of Directors authorising such call is passed. The effect of such a deeming clause is that the date of call is of importance as the call is deemed to have been made at the time when the resolution is passed. In the present case it is an admitted feature that the resolution of the meeting of the Board of Directors authorising call was passed on 26th May, 1966. Therefore, call is deemed to be made on that date, 26th May 1966. A call is a determination that an application is to be made to a shareholder for a portion of the amount of his shares. It must be stated that the making of the call and the notice of its having been made are two distinct things. See Halsbury's Laws of England, Third Edition, Vol. 6, Paragraph 43, Page 30. See also *R. v. Londonderry and Coleraine Rail Co.* (1849) 13 QB 998. A shareholder who transfers his shares after a call has been made thereon, continues liable to pay the call as between himself and the company although at the time of the transfer it may not have received the notice. The right of the company against a transferor does not, however, affect the right of the transferor against the transferee in respect of a contract of transfer. Counsel for the appellant also relied on the statement of law in Halsbury's Laws of England. Third Edition. Vol. 6. Paragraph 55, Page 36 that a shareholder is not entitled to transfer any share after a call has been made until he has paid the call due on the share held by him. It is said by counsel for the appellant that the statement of law will indicate that the liability to pay for call after it has been made attaches to the member and emphasis was placed on the liability inhering in the call itself with the result that the moment there was a resolution making the call, it became a debt due at once.

11. Counsel for the respondent on the other hand contended that a debt is due when it is payable and though a call would be a debt when it was made it would not be a debt due. Emphasis was placed by counsel for the respondent in the meaning of the word due and it was said that call would be a debt but it would not be due or else the word due would not appear in Section 399 of the Companies Act. The distinction between making of the call on the one hand and call becoming due on the other hand was put in the forefront by counsel for the respondent.

12. Reliance was placed by counsel for the respondent on Pennington's Principles of Company Law 1959 at pages 208 and 208. It is stated there that a call is a demand by the company for payment of part of the issue price of shares or debenture which has not been paid and a notice of a call has to be given to the members or debenture holders liable to pay it in which case he is not liable to pay it until proper notice has been given to him. It was therefore said by counsel

for the respondent that if a notice had to be given to member and if he was not liable to pay until proper notice was given there would be no liability to pay until the time fixed by the notice arrived

13. Reliance was also placed by counsel for the respondent on the decision in re, European Life Assurance Society (1869) LR 9 Eq 122 in support of the proposition that a debt is due when it is payable. In Stroud's Judicial Dictionary. Vol. 1 the decision in European Life Assurance Society is cited as an authority for that proposition in relation to the word due. The European Life Assurance Society's case related to an application for winding up. The petitioner in that case was a Director and the holder of shares in the Society and held a policy upon his own life. The petitioner in that case stated that as a Director he had objected to several acts and proceedings recommended by the manager of the society, and in particular to the appropriation of ₹70,000 by way of bonus to the share and policy holders. The petitioner there alleged that the moneys available at the head office for the payment of the current claims against the company did not exceed ₹10,000 and there were sums due from the agents of the company, but these sums together with those available at the head office were insufficient to meet the amounts becoming due on policies. It was alleged that the company was insolvent and unable to pay its debts, Sir W.M. James, V.C. said that the contract with the policy-holder was that the assets of the company at the time when the claim matured would be the fund out of which the claim would be satisfied and the taking of all the premiums accruing due after that in payment of past liabilities would be an improper application of the assets. It was said that the petitioner did not make out a case in any sense of inability to pay debts of the company and that inability to pay debts was said to refer to debts absolutely due, that is to say, debts for which a creditor might go at once to the company's office and demand payment. The decision in the European Life Assurance Society's case. (1869) ILR 9 Eq 122 really turned on the meaning of the phrase inability to pay within the provisions of the Companies Act in an application for winding up. It was said in the European Life Assurance Society's case (1869) ILR 9 Eq 122 that it would have to be considered as to whether payment could be demanded and as payment could not be demanded there would be no inability to pay.

14. Counsel for the respondent also relied on a Full Bench decision in Banchharam Majumdar v. Adyanath Bhattacharjee. (1909) ILR 36 Cal 936 in support of the distinction between a debt due and a debt owing and counsel for the respondent contended that in the present case the call which was made by the company might amount to a debt and it might be a debt owing but would not be a debt due. In Banchharam Majumdar's case (1909) ILR 36 Cal 936 the question for decision was whether in the case of a debt payable after the death of the creditor his heirs could sue and obtain a decree without the production of a certificate under the Succession Certificate Act. It was said that the case was to be determined on the terms of Section 4 of the Succession Certificate Act which indicated that no Court would pass a decree against a debtor of a deceased

person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof except on the production of a certificate granted under the Act and having debts specified therein. Jenkins C.J. said "that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. That is the definition given by Lord Justice Lindley in the case of *Webb v. Stention* (1883) 11 QBD 518. Why should not the ordinary meaning of the word "debt" be ascribed to it in Section 47 1 fall to see any reason. If we look at the title of the Act, the preamble and the general scope and provisions of the Act. It is clear that a present debt, though payable in future and in the circumstances actually only payable after the death of the creditor, is a debt within the terms and operation of the Act." Mookerjee, J. in the same case referred to the observation of the Judicial Committee in *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (1817) 14 IA 40 where Lord Justice James described a debt which was payable at a future day as an existing debt capable of attachment while a salary, wages or money claim accruing due was not liable to attachment. Reference was also made to the observation of Blackburn J. in *Tapp v. Jones* (1875) ILR 10 QB 591 where it was said that the term "debt" included both present debt and future debt and an actually existing debt payable by instalments not yet due, was treated as an accruing debt. Having referred to those decisions Mookerjee, J. referred to the decision of the Supreme Court of California in *People v. Arguello* (1869) 37 Calif. 524 where the Supreme Court of California referred to the word "debt" as applicable to a sum of money promised to be paid at a future day and considered the question as to whether it was a sum then due and payable. The Supreme Court of California said that if it were to be distinguished money which had been promised at a future date would be a debt owing and a money which would be due immediately would be debt due. It was also said by the Supreme Court of California that a sum of money which was certainly and in all events payable was a debt without regard to the fact whether it be payable now or at a future time. The Full Bench decision considered the question as to whether a debt in that case would be a debt within the meaning of the Succession Certificate Act. Until death occurred it would not be a debt in the facts and circumstances of that case In that background the ratio decidendi was whether a succession certificate was required in relation to such a debt. In the present case the call is deemed to be a debt when it is made and that it may be paid at a time subsequent to that date of call does not denude it of its character when it is an existing debt and a debt due

15. In the present case it is manifest under the provisions of Articles that the making of a call pursuant to the resolution of the Board has the effect of deeming the call to be at once a debt. It is a determination by the Board that an application is to be made to a share-holder for a portion of the amount of his share The articles contemplate that 30 days" notice in writing shall be sent to a person liable to pay the same Therefore the result is that the making of a call amounts to creation of a debt There is an immediate liability to pay The company gives 30 days" notice in writing to a person who is liable to Day. Lord Romilly

M.R. in the case of the China Steamship and Labuan Coal Co. Ltd. (1869) 38 LJ Ch 512 expressed the opinion that "a call is owing from the day on which it is made, although it is payable on a subsequent day." In that case a director on 27th November 1866 made a call payable on 20th December, 1866 On 17th December the shares of Mr. Dawes were declared forfeited for non-payment of previous calls The question was whether the call made on 27th November was recoverable from him. The articles of association contained a clause that "any member whose shares shall have been forfeited, shall notwithstanding be liable to pay to the company all sums or calls owing upon such shares at the time of the forfeiture." Mr. Jessel appeared on behalf of Dawes and argued that the words "owing at the time of the forfeiture" meant payable at that time. Mr. Roxburgh for the liquidators argued that the call was "owing" from the time when it was made, although payable at a future date. Lord Romilly. M.R. said that the moment the call was made it was a debt due in every respect. Reference was made to the decision in the North American Colonial Association of Ireland v. Bentley (1850) 15 Jur. 187 and it was contended that Dawes shares were forfeited three days before the call could be compulsorily enforced. Lord Romilly, M.R. said that Dawes was bound to pay without any words in the articles and the words in the articles made it clear that the call was owing at the moment it was made In the present case the articles also indicate that the call has the effect of making it a debt at the time it is made and there is an immediate liability to in respect of that debt though there is a fine to pay it

16. In the Bench decision in the case of The Indian Co-operative Navigation and Trading Co. Limited Vs. Padamsey Premji, Beaumont, C.J. considered the case where the company sued the defendant for the sum of Rs. 4,500 being the amount alleged to be due from him in respect of calls payable on shares. The defendant there applied for 600 shares of Rs. 10 each and paid a sum of Rs. 1,500, that is, Rs. 2-8-0 per share. The application was made on 23 August, 1919. Under the articles of association of the company moneys were payable on allotment amounting to Rs. 2-8-0 per share and the balance of Rs. 5 was payable within 30 days from the date of the second payment The company stated on 3 August, 1920, that is nearly a year after the application, 600 shares were allotted to the defendant, and accordingly he became liable to pay another Rs. 1,500 on 3 September, 1920 and the balance of Rs. 3,000 on 4 October. 1920. In the trial Court it was held that the defendant became liable to pay and his shares were forfeited and on the defendant ceasing to be a member the defendant ceased to be liable to pay any further money in his capacity as a shareholder. It may be stated here that the time for payment was extended till 15th May 1921 and the case of the company was that on 17th March 1921 the company passed a resolution forfeiting the shares of the defendant. Beaumont C.J. said that the terms "money owing" or "money due" in their primary sense denoted an existing debt, whether or not the right to recover the same was BARRED under the Limitation Act, though no doubt either expression might bear the secondary meaning of "recoverable in law" if the context so required. It was observed in

that case that it was held in England that a call was owing from the date when it was made, although it might be payable at a future date. The effect of Limitation Act is that a debt is not destroyed but the remedy to recover it is barred. Beaumont. C.J. said that the words "money due" had the same meaning as "money owing" and referred to the decision of the Judicial Committee in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 where the Privy Council gave to the expression "money due" the meaning "due and recoverable in law" and said that the provisions in Section 186 of the Companies Act 1913 related only to procedure for enforcement of payment and did not impose any liability. The words "recoverable in law" would be relevant as to whether there was any question of limitation or any other bar against recovery. It is in that sense that Darling, J. said in *In re Moss, Ex parte Hallet* (1905) 2 KB 307 "In my opinion, money can only be said to be due in a legal sense when it can be recovered in an action, and it is impossible to say that there can be anything due under this security when no money can be recovered by any legal process."

17. The provisions in the Companies Act in Section 399 are that a member has paid calls due on shares. The making of a call results in the call becoming due. The company made a demand. It is true that the person concerned namely, the member on whom a call had been made for the shares, was given time till 29th June, 1966 to pay. He was given notice to pay because of the debt. He was required to pay because of his liability to pay. Therefore the member had to satisfy the debt due. The distinction between a debt and payment has to be kept in view because payment is required for a debt which is due. The Companies Tribunal also held that even if Kshetra Mohan Saha did not pay calls which were due from him on or before the date fixed by the notice of demand he would not be disqualified within the meaning of Section 399(1)(a) of the Companies Act. The decision of the Companies Tribunal is wrong and in error. It is an error of law. The call is a debt due. A member can apply provided a member satisfies the requirement contemplated in Section 399(1)(a) of the Companies Act. A member is to pay the dues Counsel for the appellant rightly contended that the proviso occurring in Section 399(1)(a) of the Companies Act was a condition to be fulfilled by a member who had a right to apply. Reliance was placed on the Statement of Law in Maxwell on interpretation of Statutes. Eleventh Edition, page 364 that where powers, rights or immunities were granted with a direction that certain regulations, formalities or conditions should be complied with, it seemed neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it was therefore probable that such was the intention of the legislature. Counsel for the appellant is right in his contention that the proviso in Section 399 contemplated payment of dues before the right was exercised. In the present case that was not complied with. The result is that Kshetra Mohan Saha is not a person entitled to apply on 26th May 1966 because he did not pay the calls but on the shares.

18. The case of Sridhar Sikdar is that as a result of the decree dated 29 March, 1963 in Suit No. 388 of 1959 instituted in the City Civil Court, Sridhar Sikdar

became owner of ten shares and the decree was for rectification of the register. Sridhar Sikdar applied to the company for rectification on 16 May, 1966. On 26th May, 1966 Sridhar Sikdar made the application to the company for rectification. The company on 18 June, 1966 rectified the name of Sridhar Sikdar. It was said on behalf of the appellant that on the date of the petition 26th May, 1966, Sridhar Sikdar's name was not in the register of the company and therefore he would not be a member within the meaning of Section 399(1)(a) of the Companies Act. Counsel for the appellant relied on the decision of the Supreme Court in *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, in support of the proposition that an applicant had to satisfy the requirements of membership as on the date of the presentation of the petition and since Sridhar Sikdar's name was not in the register of members on the date of the petition he was disentitled to apply. Reliance was also placed on the decision in *Ved Parkash and Others Vs. Iron Traders (Private) Ltd. and Others*, in support of the same contention that unless the name of Sridhar Sikdar was entered in the register of members on the date of the petition he could not apply. In the *Punjab* case a petition was filed under Sections 397 and 398 of the Companies Act. The locus standi of the petitioners was challenged. It was found that the petitioners were not members on the date of the presentation of the petition. It was contended that the act of directors in rectifying register and striking out of the names of the petitioners was illegal. The petitioners in that case alleged that their names had been wrongfully struck out and they asked for the relief of rectification of the share register. It was noticed in the *Ved Parkash and Others Vs. Iron Traders (Private) Ltd. and Others*, that the petitioners made an application for rectification of the register which was dismissed and that the petitioners in that case did not file a suit to establish their rights and yet they were seeking the relief. *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, has no application because there 13 members withdrew consent later on.

19. The facts in the present case are entirely different. It is indisputable that the right of Sridhar Sikdar is recognized by the decree. He succeeded in the suit for rectification. There was a decree in his favour for rectification. The decree was made as early as the year 1963. Sridhar Sikdar made the application for rectification on 16 May, 1966. It was said that Sridhar Sikdar should have applied earlier and should have insisted on his name being, entered in the register of members prior to his making this application under Sections 397 and 398 of the Companies Act.

20. Counsel for the appellant relied on Section 111 of the Companies Act and contended that the company would have two months time to rectify the register. The provisions contained in Section 111 of the Companies Act state that if a company refuses, whether in pursuance of any power under its articles or otherwise, to register any such transfer or transmission of right, it shall, within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send

notice of the refusal to the transferee and the transferor. Obviously this has no application in the present case.

21. Counsel for the respondent relied on the decision in *Pulbrook v. Richmond Consolidated Mining Company* (1878) 9 Ch D 610 in support of the contention that the decree for rectification in favour of Sridhar Sikdar had the effect of Sridhar Sikdar's name being on the register and he was therefore a member. In the *Richmond Consolidated Mining Company* case. (187B) 9 Ch D 610 Pulbrook was the holder of 100 shares of the nominal value of ₹500. Prior to his election as a director in the month of January, 1877, Pulbrook executed a deed of transfer of his share to William Cuthbert by way of mortgage. On 18 January, 1878, Cuthbert, through mistake, as Pulbrook alleged, took the transfer to the secretary of the company to register the same and inserted Cuthbert's name as the holder of the shares. Pulbrook who had been a director of the company was not allowed to take his seat. Pulbrook then took out a summons for rectification of the register and by an order of Field, J. dated 1 March, 1878, the name of Cuthbert was ordered to be struck out as the transferee of the said shares and the name of Pulbrook inserted as the holder of the shares. On appeal by the Divisional Court on 25 June, 1878 Pulbrook took his seat at the Board, but the other directors refused to permit him to act. Pulbrook then brought a case against the company. Pulbrook took out a Notice of Motion to restrain the directors by injunction from interfering with Pulbrook's rights. One of the questions in that suit was whether Pulbrook was holding shares as a registered member in his own right. Jessel, M.R. considered the meaning of the words "in his own right." It was held that the company could not look behind the register as to the beneficial interest, but must take the register as conclusive, and could not inquire, either for that purpose, or indeed for any other, into the trusts affecting the shares. Jessel. M.R. next considered the effect of the order of Field, J. as also the order of the Divisional Court and said "So there are two decisions of two courts on the same point in the same matter. The result is that, rightly or wrongly, but I am bound for this purpose to assume rightly, the name of Mr. Cuthbert has been struck out of the register and the register rectified. The effect of that is exactly the same as if it had never been put in. That is the meaning of "rectified." You strike it out by way of rectification, and the Court has therefore declared that it ought never to have been entered at all. They have struck it out from the beginning." Jessel. M. R. concluded by saying as regards registration of that transfer, there was no registration, and never was for that purpose and consequently Mr. Pulbrook remained rightly a director.

22. It is to be found in the *Richmond Consolidated Mining Company* case (1878) 9 Ch D 610 that the articles of association required that "no person shall be eligible as a director unless he holds as registered member in his own right capital of the company of the nominal value of ₹500". The articles of association required a director to be "a registered member in his own right". It was held that the holding of shares by Pulbrook was not only in his own right, but that he was a member and the effect of the two orders of Field, J. and of the Divisional Court

in regard to rectification was that he was a registered member. It was said by counsel for the appellant that unless and until the register was rectified Sridhar Sikdar would not be a member. The decision of Jessel, M.R. repels such a construction. Counsel for the respondent is, in my opinion right in his contention that the decision in Richmond Consolidated Mining Company case (1878) 9 Ch D 810 and the observations of Jessel, M.R, are in support of the contention of Sridhar Sikdar that in the present case he is a member as a result of the decree of rectification. The fact that the company did not actually rectify at the date of the presentation of the petition does not have the effect of nullifying the decree for rectification, namely, that there was never any other entry but the one which was to be inserted by rectification.

23. Reliance was placed by counsel for the respondent on the decision in Panna Lal v. Jagat Jit Distillery AIR 1952 Pep 92 in support of the same contention that rectification of the register would mean that as far as Sridhar Sikdar is concerned there was continuity in the possession of holding of shares and the striking out of the name by the company would not rob Sridhar Sikdar of his right of membership of the company. In Jagat Jit Distillery case. AIR 1952 Pep 92 an application was made for winding up. One of the contentions was that the petitioner did not satisfy the right to present the application for winding up. It was said in the Distillery case that the petitioner succeeded in obtaining an order for rectification. The Court ordered the name of the petitioner to be entered as holder. It was, therefore, said that the order was that he was to continue to be a registered share-holder in respect of the shares which stood in his own name Counsel for the appellant contended that the decision in the Pepsu case. AIR 1952 Pep 92 related to meaning of persons who were either creditors or contributories with the right to apply for winding up and therefore it was not a decision on the meaning of registered members. The decision of Jessel, M.R. in (1878) 9 Ch D 610 to which reference has already been made is an authority of antiquity and it has not been disturbed in England as will appear from the Statement of Law in Palmer's Company Precedents. Vol 1 17th Edition at page 1087 foot-note 37 where it is stated that the effect of an order for rectification by striking out the name is the same as if the name had never been put on. It will also appear at page 374 in Palmer's book that the decision in Pulbrook. (1878) 9 Ch D 610 has been acted on for many years and when in Bainbridge v Smith. (1889) 41 Ch D 462 it was called in question it was held to be too late to challenge the case.

24. Counsel for the appellant relied on foot-note 35 in Palmer's Company Precedents, Vol. 1. 17th Edition at page 1087 that the order to rectify the register does not invalidate notices to registered members of a meeting to pass resolution for voluntary winding up as also the decision in re Sussex Brick Co. (1904) 1 Ch 598 and foot-note 34 and the proposition appearing at page 1087 of the Palmer's Company Precedents, Vol. 1 in support thereof that an order nunc pro tunc had to be made in order to clothe a member with the right of being a registered member. It is a different one thing (sic) to state that if a company

gives notice to registered members of a meeting to pass resolution for winding up it would not invalidate the meeting because it has not given notice to a person who contends that he is a registered member and is entitled to a notice. In any event the order *nunc pro tunc* which is stated in *Palmer* merely states that the Court may fix a particular date from which day an alteration has become operative. The decision in (1878) 9 Ch D 610 already referred to establishes the proposition that the effect of rectification is that the entry rectified has always been there.

25. Counsel for the respondent rightly contended that the company in the present case could not take advantage of its own wrong by not putting the name of Sridhar Sikdar in the register of members. The decree was there. It may be that the decree was not enforced by the decree-holder Sridhar Sikdar. The legal effect of rectification is that he remained the member and the entry in the register by striking out his name amounted to no entry at all. The result is that Sridhar Sikdar satisfies the provisions contained in Section 399(1)(a) of the Companies Act and was entitled to apply under Sections 397 and 398 of the Companies Act.

26. The next question is whether the other provisions contained in Section 399(1)(a) were attracted, namely, whether the applicants were representing the enumerated proportion of members of the company. As I have already indicated Kshetra Mohan Saha was disqualified to apply under Sections 397 and 398 of the Companies Act and Sridhar Sikdar was qualified to apply. The result is an investigation as to whether Sridhar Sikdar would be holding 1/10th of the issued share capital of the company. Before the Companies Tribunal it was contended by the company that the total number of the members of the company was 32. The Companies Tribunal found that the Company allotted 275 shares on 28 April, 1968 and 23 May, 1966 in favour of 22 persons. The validity of that allotment was challenged by the petitioners and by the order of the Companies Tribunal dated 27 January, 1967 the preliminary issue had to be decided without taking into consideration the issue of those 275 shares amongst other new shares. The result was that the Companies Tribunal did not take into consideration the allotment of 275 shares to 22 persons by the order dated 27 January, 1967. That order is not impeached. Parties proceeded before the Companies Tribunal on the rival contentions as to whether on the date of the presentation of the petition the number of members would be 11 or 10. On behalf of the company it was contended that the total number of members of the company would be 11 and not 10 as stated in paragraph 11 of the petition. On behalf of the company it was pointed out that Chinmoyee Saha who was shown as one of the joint-holders of some shares as one of the heirs of Gour Gopal Saha was also alleged to be a share-holder in her individual capacity. The Companies Tribunal, said, in the absence of fuller evidence, it would not be proper to give any finding on the respective contentions raised by the company and the petitioners as regards transfer made in favour of Chinmoyee Saha. The Companies Tribunal further stated that it was not necessary for the Tribunal to do so because even assuming

that the total number of members of the company was 11, as contended by the company, the two petitioners would constitute not less than 1/10th of the total number of the company and would therefore, be competent to file the petition. The Companies Tribunal did not come to any decision as to whether the number of members was 11 or 10. The Companies Tribunal said that it could not go into the question of Chinmoyee Saha's shares in the absence of fuller evidence.

27. Counsel let the appellant contended that the Companies Tribunal committed error of law in regard to the question as to what the number of members was. Reliance was placed on the provisions contained in Section 164 of the Companies Act which indicate that the register of members, the register of debenture-holders, and the annual returns certificates and statements referred to in Sections 159, 160 and 161 shall be prima facie evidence of any matters directed or authorized to be inserted therein by this Act. In that view of the matter it was rightly contended by counsel for the appellant that Chinmoyee Saha's name being on the register of members if no other evidence was called and if fuller evidence had not been laid before the Tribunal the prima facie evidence was not rebutted or displaced. It was rightly said by counsel for the appellant that failure to observe the effect of Section 164 of the Companies Act is an error of law and the Companies Tribunal should have held that the number of members is 11. The result is, in my opinion, that the number of members on the date of the presentation of the petition was 11 and, therefore if Sridhar Sikdar was qualified to apply under Sections 397 and 398 Sridhar Sikdar would not be satisfying the provisions of Section 399 of the Companies Act and the petition would be within the vice and mischief of Sections 397 and 398 read with Section 399(1)(a) of the Companies Act.

28. The last contention which was advanced by counsel for the appellant was that the Companies Tribunal erred in regard to the determination as to whether there was allegation of a present or continuing wrong within the meaning of Sections 397 and 398 of the Companies Act. Counsel for the appellant relied on the decision in Shanti Prasad Jain Vs. Kalinga Tubes Ltd., in support of the proposition that there must be continuous acts on the part of the majority shareholders, continuing upto the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. Further it was said by counsel for the appellant that in the present case the allegations related to past affairs and were not continuing affairs. The Companies Tribunal noticed the allegations in the petition which concerned the affairs of the company for several years prior to the date of the petition and the contentions advanced on behalf of the company that the affairs related to the malpractice and misappropriations during the time Kshetra Mohan Saha was in the management of the company. It was also contended on behalf of the company that other allegations were of a minor character. The contention on behalf of the petitioners before the Companies Tribunal was that the allegations in the petition would be within reasonable proximity of the filing of the petition and if the respondent did not refund moneys alleged to be appropriated that

would be continuing wrong The Companies. Tribunal held that the respondent company was manufacturing medicine and other products and if misappropriation and mismanagement is made it should be in the public interest to have proper investigations into the illegations.

29. Counsel for the respondent placed reliance on paragraphs 29, 33, 35, 37 and 40 of the petition in support of the contention that there was continuing wrong. In paragraph 29 of the petition it is alleged that Amarendra Lal Das indulged in malpractices to reduce the real profits of the company and further allegations were that the firms hum whom purchases were made had no existence at all The assessments of the company for the years 1959-60 up to the years 1964-65 were referred to and, broadly stated the allegations were that there were false and fictitious entries Raw materials were not received and the amounts were misappropriated. In paragraph 33 of the petition it is alleged that residence of Amarendra Lal Das and Sm. Sujata Saha was searched by the Income Tax authority and large sums of unaccounted money and gold were seized. The allegations are that the unaccounted money and gold belonged to the company and Sujata Saha and Amarendra Lal Das acquired the said money and gold by misappropriating the funds of the company. In paragraph 40 it is alleged that during the years 1960-61 a number of motor vehicles were purchased, machinery was purchased and repairs were carried out at the factory premises and expenses were met and such expenses in regard to motor vehicles and machinery of M/s. Emsons Pharmaceutical (P) Ltd. were really the misappropriation of funds of the company by Amarendra Lal Das. In paragraph 37 it is alleged that Sujata Saha and Amarendra Lal Das misappropriated large sums of money: purchased furniture out of the funds of the company and moreover their own relation was appointed as a telephone operator at Rs. 350 per month and in the year 1959 Gour Gopal Saha purchased a house at 84 Chowringhee Road, Calcutta in the benami name of his wife Sm. Sujata Sahe out of the funds of the company. The other allegations are that a car has been purchased and funds of the company have been spent. Counsel for the respondent contended that there was wrong management and as long as money was not restored the wrong would continue. I am unable to accept either of the contentions on behalf of the respondent. Misappropriation of money in the past is not continuing wrong. There is no evidence of mismanagement. The Companies Tribunal has not made any finding of mismanagement The view expressed by the Companies Tribunal that if charges of misappropriation and mismanagement are made, it would be in public interest to have proper investigation is to be substantiated with reference to facts. Counsel for the appellant in my opinion, rightly contended that the Companies Tribunal failed to apply the principles of law laid down by the Supreme Court in Shanti Prasad Jain Vs. Kalinga Tubes Ltd., and on the observation appearing at p. 557 that there must be continuous acts on the part of the majority share-holders continuing up to the date of petition showing that the affairs were being conducted in a manner oppressive to some part of the members. The conduct must be burden-some harsh and wrongful and

mere lack of confidence between the majority shareholders and the minority share-holders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a share-holder. The allegations in the present case do not amount to allegations of continuous acts or continuing wrong on the date of the petition. The petition, therefore is not sustainable within the meaning of Sections 397 and 398 of the Companies Act. The decision of the Companies Tribunal is erroneous.

30. For these reasons I am of opinion that the decision of the Companies Tribunal is wrong. The decision is set aside The appeal is allowed. The appellants are entitled to costs. Certificate for two counsel. All interim orders are vacated.

S.K. Mukherjea, J.

31. I desire to add a few words of my own on one aspect of the case which, in my opinion, merits attention I refer to the question of competence to maintain an application under Sections 397 and 398 of the Companies Act, of a person whose name does not appear in the Register of members but has been directed by a competent Court to be entered in the Register. It is urged that as his name had not been inserted in the Register in pursuance of the Court's order by the time the petition was presented, he has no locus standi to maintain the application having regard to Sections 41 and 164 of the Companies Act. I hope it will not be contended that if a leaf is wrongfully torn off out of the Register and consigned to the flames, members whose names appeared on the torn leaf will cease to be members, I do not think they will, any more than a company will cease to have any member if its Register of Members suffers destruction. If a member's name is wrongly deleted the legal position is precisely the same. Once the Court holds that his name has been wrongly removed from the Register and ought to have been there, he must be treated in the eye of law as if his name had never been deleted. Disappearance or absence of the name of a member from the Register does not, in all circumstances, conclude the matter

32. In (1878) 9 Ch D 610 the articles of association of the company provided that no person should be eligible as a director unless he held as a registered member in his own right shares of the nominal value of ?500 at least, and a director was to vacate his office if at any time he held less than the nominal amount of capital required in his qualification for election. The plaintiff who held the requisite qualification shares was elected a director Prior to his election he had executed a deed of transfer to Cuthbert by way of mortgage as a security for a loan on the understanding that the transfer would not be registered. After the plaintiff's election as a director. Cuthbert had his name as the holder of those shares transferred to him by the plaintiff. On having received notice of the transfer, the directors refused to permit the plaintiff to take his seat at the board. The plaintiff took out a summons for rectification of the Register and by an order of Court, the name of Cuthbert was directed to be struck out as the transferee of

those shares and the name of the plaintiff inserted as the holder of the same The order was affirmed on appeal.

33. A few days later, the plaintiff took his seat at the board and produced the order but the other directors refused to permit him to act, whereupon he brought an action against the company and the other directors and sought on a motion to restrain the directors by injunction from interfering with his rights. In holding that the plaintiff was entitled to the injunction he asked for, Jessel M.R. said:

"Rightly or wrongly, but I am bound for this purpose to assume rightly, the name of Mr. Cuthbert has been struck out of the Register and the Register has been rectified. The effect of that is exactly the same as if it had never been put in. That is the meaning of "rectified". You strike it out by way of rectification, and the Court has therefore declared that it ought never to have been entered at all. They have struck it out from the beginning.

The result is, so far as regards registration of the transfer, there is no registration, and never was for this purpose, and consequently Mr. Pulbrook rightly remains a director."

The learned Master of Rolls said, as he so often did, no more or no less than common sense demands. On general principles as also on the authority of Jessel, M.R., and I know of no better, I am of opinion that Sridhar Sikdar must be treated as a member for the purpose of the application under Sections 397 and 398 of the Companies Act.

34. I agree that on the basis of the findings of the Tribunal and having regard to Section 164 of the Companies Act, the number of members of the Company must be held to have been eleven and Sridhar Sikdar alone cannot maintain the application in view of the provisions of Section 399 of the Act I also agree that the petitioner Kshetra Mohan Saha was not competent to make the application for not having paid the calls due on the date of presentation of the petition. In the view I have taken. I agree that the appeal ought to succeed and I concur in the order my Lord has made.