

(1933) 09 BOM CK 0005
In the Bombay High Court
Case No : O.C.J. Appeal No. 26 of 1933

The Indian Co-operative Navigation and Trading Co. Limited	APPELLANT
Vs	
Padamsey Premji	RESPONDENT

Date of Decision : 19-09-1933

Acts Referred:

Limitation Act, 1908 — Article 112

Citation : AIR 1934 Bom 97 : (1934) 36 BOMLR 32 : 150 Ind. Cas. 645

Hon'ble Judges : John Beaumont, J;Blackwell, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal against a decision of Mr. Justice Mirza. In the suit under appeal the plaintiffs who are a limited liability company sued the defendant for the sum of Rs. 4,500, being moneys alleged to be due from him in respect of calls payable on shares held by him in the plaintiff company. Their case is that the defendant applied for 600 shares of Rs. 10 each and paid a sum of Rs. 1,500, that is, Rs. 2-8-0 per share, with his application. The application which is Exh. A is not dated but the plaintiffs case is that the application was made on August 23, 1919. The defendant's case is that it was made at a later date. Under Article 38 of the company's articles of association moneys payable on allotment amounting to Rs. 2-8-0 per share are payable thirty days after application, and the balance of Rs. 5 per share is payable within thirty days from, the date of the second payment. The plaintiffs further say that on August 3, 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 September 3, 1920, and the balance of Rs. 3,000 on October 4, 1920. There is no evidence of any notice of allotment having been given to the defendant; nor is there any evidence of any notice to the defendant to pay the moneys remaining due in respect of the 600 shares. The plaintiffs admit that the time for payment was extended to May 15, 1921, and their case is that on March

17, 1925, they passed a resolution, under Article 42 of the articles of association, forfeiting the defendant's shares (Ex. I). This suit was started on January 5, 1928. Assuming the dates alleged by the plaintiffs to be correct, the defendant became liable to pay these moneys on May 15, 1921, and at the date of the resolution for forfeiture in March 1925 the defendant's liability had become barred under Article 112 of the Indian Limitation Act. The learned Judge held that the defendant was a member of the company, and that the shares were well forfeited. He further held that on the forfeiture occurring, and the defendant ceasing to be a member of the plaintiff-company, the defendant ceased to be liable to pay any further moneys in his capacity as shareholder, and that any further liability of the defendant must be based on some separate contract making him liable to pay these moneys after he had ceased to be a shareholder. That view of the law. is clearly right and follows Stocken's Case (1868) 3 Ch. App. 412 which has been followed in this country in Habib Rowji v. The Standard Aluminium and Brass Works Ltd ILR (1925) Bom. 715 : 27 Bom. L.R. 574 and Maneklal Mansukhbhai v. The Suryapur Mills Co. Ltd ILR (1927) Bom. 477 : 29 Bom. L.R. 253 The special contract relied on in this case is Article 45 which provides that any shareholder whose share may be forfeited shall notwithstanding the forfeiture be liable to pay to the company all moneys owing upon the shares at the time of forfeiture and the interest if any thereon. The learned Judge took the view that "all moneys owing upon the shares at the time of forfeiture" meant moneys owing and recoverable in law, and inasmuch as at the date of the forfeiture these moneys were time-barred the learned Judge held that the contract embodied in Article 45 did not require the defendant to pay the moneys. The learned Judge based his view largely on the decision of the Privy Council in Hansraj Gupta v. Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co. (1932) 35 Bom. L.R. 319 On the view I take of the facts in this case it is not really necessary to decide that point, but I would say that if I took the same view of the facts as the learned Judge took, I should not be prepared to agree with him that the defendant was not liable under Article 45. In my opinion the terms "money owing" or "money due" in their primary sense denote an existing debt, whether or not the right to recover the same is barred under the Indian Limitation Act, though no doubt either expression may bear the secondary meaning of "recoverable in law" if the context so requires. It has been held in England that a call is owing from the date when it is made, although it may be payable at a future date. It is of course well settled that under the Indian Limitation Act, as under the English Limitation Acts, a debt is not destroyed, only the remedy to recover it is barred. The case in the Privy Council on which the learned Judge relied was a case arising u/s 186 of the Indian Companies Act. That section provides that the Court may at any time after making a winding-up order make an order on any contributory for the time being settled on the list of contributories to pay in manner directed by the order any money due from him. I agree with the learned Judge that the expression "money due" has the same meaning as "money owing", but the basis of the decision of the Privy Council was that Section 186 deals only with procedure for enforcing payment and does not

purport to impose any liability. On that view of the section the Privy Council gave to the expression "money due" the meaning "due and recoverable in law". I agree that if the context so required, a similar construction should be placed on the expression "money owing", but in my view there is no sufficient context in these articles to induce us to give that meaning to the expression in Article 45. Article 45, unlike Section 186 of the Indian Companies Act, does undoubtedly impose a new liability. Article 42, which provides that if any shareholder fails to pay any money due from him in respect of any share on the appointed day the shares in respect of which any money is owing will be liable to be forfeited without any further notice, has some bearing on the matter. I think clearly in that article "money owing" is used in the sense of money due which need not necessarily be recoverable in law. Mr. Khergamwala for the defendant relies on the last part of Article 48, which provides that on forfeiture of shares the money which was owing on them shall continue to be payable by the person who was liable to pay the same at the time of forfeiture, and he contends that the expression "liable to pay the same" denotes liability to be sued in law. The expression is, I think, ambiguous, and, in my opinion, it is not enough to control the natural meaning of the language used in Article 45.

2. But Mr. Khergamwala has supported the judgment under appeal upon other grounds, his first contention being that the defendant never became a member of the company, there having been no valid allotment of shares to him. I feel confident that in point of fact we have not got in evidence a good many communications which must have passed between the plaintiff-company and the defendant or somebody on his behalf. But so far as the evidence goes we have nothing but this: that the defendant applied for shares (I will assume, in August 1919), and that an allotment was made in August 1920, there having been no communication at all between the plaintiff-company and the defendant as to the delay in allotment, or as to the allotment ultimately having taken place, and no application was made for any moneys payable on the shares and no notice given of any forfeiture. Those are the facts as found by the learned Judge. I think that there must in fact have been further communications because it is difficult to suppose that the defendant would have paid Rs. 1,500, and would never have taken the trouble either to get the money back, or to see that he got the shares for which he had applied. However, those facts as found by the learned Judge, and I think rightly found, are all we have got to go upon. Now it was settled as long ago as 1866 in *Ramsgate Victoria Hotel Co. v. Montefiore* (1866) L.R. 1 Exch. 109 that an allotment of shares must be made within a reasonable time and that a defendant is not bound to accept an allotment made after the lapse of a reasonable time. In that case the delay was from June 8 till November 23 and it was held that the delay was unreasonable. Here I think clearly the delay between the application in August 1919 and the allotment in August 1920 was unreasonable. No doubt if the defendant had been given notice of the allotment, and had not objected to it promptly, he would have been bound. But we have no evidence that he was ever told anything whatever about the allotment. That

being so, I see no reason why he should not in this suit challenge the allotment. On that view of the matter the defendant never became a shareholder in the company.

3. The defendant's own case is that his application for shares was considerably later than August 1919, and he relies on a receipt given to him for the application money which was dated July 13, 1920, being Ex. D. If the defendant did not apply for the shares in August 1919, there was no resolution to forfeit the shares, because the resolution for forfeiture (Ex. E) deals only with shares in respect of which applications were made between certain dates in August 1919. I am disposed myself for the reasons given by the learned Judge to think that he is right in saying that the date of application was that relied on by the plaintiffs, namely, August 23, 1919. But on that basis, in my opinion, the allotment was too late and the defendant is not bound by it. The learned Advocate General on this point relies on Articles 12 and 38. He says that under Article 12 an application signed by the applicant for shares followed by an allotment constitutes acceptance of the shares and renders the person applying liable as a shareholder. Then he relies on Article 38 which provides that a person applying for shares shall pay Rs. 2-8-0 per share with the application and unless he is informed to the contrary he shall take it for granted that the shares applied for have been allotted to him and shall within thirty days pay further Rs. 2-8-0 per share and then pay the balance of Rs. 5 per share within thirty days from the date of the second payment. Reading those two articles together the learned Advocate General contends that the defendant became a shareholder and that the plaintiff-company was not bound to give him notice of the allotment. I agree that under Article 38 the rule which normally applies, namely, that notice of allotment must be given, is dispensed with, because the shareholder has to assume that an allotment has taken place unless he is told to the contrary. But it seems to me plain that that article, in so far as it fixes the dates for payment, is based on the view that the allotment will take place at any rate within thirty days from the date of the application, because the second instalment is to be paid within thirty days from that date, and obviously the moneys payable on allotment are not to be paid if no allotment has taken place. If, therefore, I thought that the defendant had in fact become a member of the company, I should say that no dates for payment of the moneys due on the defendant's shares were ever fixed, because the only dates for payment relied on by the plaintiffs were those specified in Article 38 which seem to me to have no application where the allotment takes place more than thirty days after the application. The view which the plaintiff-company seems to have taken of that article is that the first thirty days run from the date of allotment. But that, I think, is not so, because there is no obligation to give to the shareholder notice of the allotment, and therefore on that basis he cannot tell from what date the thirty days are to run: I think what the article means is that the thirty days are to run from the original application. In my opinion, therefore, even if the defendant became a member of the plaintiff-company, no time was appointed for payment of the moneys due on his shares

and the provisions of Article 42 as to forfeiture never came into operation. But in my view the true position is that the alleged allotment of shares in favour of the defendant took place after an unreasonable delay which entitled the defendant to repudiate the allotment, and as there is no evidence that the defendant was informed of the allotment, he was entitled to repudiate it for the first time in this suit. On those grounds I think that the appeal must be dismissed with costs.

Blackwell, J.

4. I am of the same opinion. The learned Advocate General has contended that the defendant had waived his right to contend that the allotment had been made an unreasonable time after the application. In support of that contention he relied upon a receipt Ex. D dated July 30, 1920 which had been produced by the defendant himself for the sum of Rs. 1,500, the deposit made by him in respect of his application. The contention of the Advocate General was that that receipt having been given on July 30, 1920, and the allotment having been made on August 3, 1920, the allotment was made within a reasonable time of the receipt and there had been no subsequent repudiation by the defendant. The fallacy in that argument appears to me to be this: there is no evidence whatever that the defendant knew whether the shares had been allotted or not allotted at the time he got that receipt. He was entitled to his receipt and this was in fact the only receipt which was given to him. It seems to me that in the absence of evidence that he was aware that the shares had not already been allotted there can be no question of any waiver on his part of his rights whatever they were at that time. Having regard to the case of *Ramsgate Victoria Hotel Co. v. Monte fiore* (1886) L.R. 1 Exch. 109 to which the learned Chief Justice has referred, it seems to me that the defendant was entitled to say that as more than a year had elapsed from the date of his application without any allotment having been made to him he was entitled to take the point that he has never become a shareholder in this company. In those circumstances the forfeiture was bad and Article 45, which is relied on by the plaintiffs as entitling them to recover moneys notwithstanding the forfeiture, cannot prevail.

5. It is unnecessary in the view which we have taken of this case to decide the question on the point of limitation. But if I had had to decide it, with great respect to the learned trial Judge, I should have taken a different view as to the meaning of the expression "money owing" in Article 45. The learned Judge gave to that expression the meaning owing and recoverable in law, relying upon the decision of the Privy Council to which the learned Chief Justice has referred which turned upon the proper construction of Section 186 of the Indian Companies Act. But their Lordships were careful to point out that that was a section which created a special procedure for obtaining payment of money and was not a section which purported to create a foundation upon which to base a claim for payment; and they further pointed out that by reason of the place and the context in which those words were found they thought that the expression must be treated as meaning money due and recoverable in a suit by the company In

my opinion that decision has no application to the case before us, because in the present case the suit is based upon an independent contractual liability arising out of Article 45 of the articles of the company. Taking the words "money owing" in their natural significance they appear to me to mean "money owing whether recoverable or not. Although the right to recover money due or money owing may be barred by a statute of limitation, the money still remains due or owing, and I see no reason at all why a shareholder should not enter into an independent contract in the articles providing that if he should cease to be a shareholder by reason of the forfeiture of his shares he should nevertheless be bound to pay as a debt independent of his liability as a shareholder moneys which were owing by him at the date of the forfeiture in the sense in which I read those words. Article 42 clearly requires us to treat the expressions "money due" and "money owing" in that: article in the sense of money due or money owing whether recoverable or not. Mr. Khergamwalla has strongly relied upon the expression "liable to pay" in Article 45, but that in my view is an expression which is ambiguous, and which may mean either legally liable or liable independently of any enforceable legal obligation. Seeing that the words are capable in my view of that double meaning, I see no reason why one should read into the expression in Article 48 the word "legally" before the word "liable". Taking the articles together, in my opinion, the expression "money owing" means money owing although not enforceable by action.

6. I agree that this appeal must be dismissed upon the other ground.