

(1949) 03 MAD CK 0047

In the Madras High Court

Case No : Original Side Appeal No"s. 3 and 50 of 1947

The Jawahar Mills Ltd.

APPELLANT

Vs

Sha Mulchand and Co. Ltd.

RESPONDENT

Date of Decision : 11-03-1949

Acts Referred:

Companies Act, 1913 — Section 38
Limitation Act, 1908 — Article 120, 25, 48, 49

Citation : AIR 1951 Mad 572 : (1950) ILR (Mad) 339 : (1949) 62 LW 635

Hon'ble Judges : Viswanatha Sastri, J; Satyanarayana Rao, J

Bench : Division Bench

Advocate : V.K. Thiruvengkatachari, N.V.B. Sankar Rao and G. Vasanta Pai, in No. 3, N. Sivarama Krishna Iyer and R. Viswanathan, in No. 50, for the Appellant; V.K. Thiruvengkatachari, N.V.B. Sankar Rao and G. Vasanta Pai for Respondent in No. 50, N. Sivarama Krishna Iyer and R. Viswanathan for Respondent in No. 3, for the Respondent

Judgement

Satyanarayana Rao, J.—This is an appeal from the judgment of Clark J. arising out of proceedings u/s 38, Companies Act, to rectify the

register. The respondent company was the applicant and the application was granted by the learned Judge. The substantial prayer in the application

was in these terms:

Why the share register of Jawahar Mills Ltd., should not be rectified by restoring the name Shah Mulchand & Co. Ltd., to the said register in

respect of 5000 shares numbering 15048 to 20047.

Jawahar Mills Ltd., are the appellants in this appeal. The application was filed by the liquidator of Shah Mulchand and Co, Ltd., Salem, which was

ordered to be wound up by an order of this Court in O. P. No. 199 of 1944.

2. Jawahar Mills Ltd., the appellant, is a company registered under the

Companies Act. Shah Mulehand and Co. Ltd., were the managing agents of Jawahar Mills Ltd., from the starting of the company till 30-6-1939 on which date they resigned the managing agency. On that day Shah Mulehand and Co. Ltd., held 5000 ordinary shares of RS. 10 each in Jawahar Mills Ltd., bearing Nos. 15048 to 20047 in respect of which shares Rs. 5 was paid by that date, i. e., RS. 2 along with the application and Rs. 3 on allotment. The respondent company owed to Jawahar Mills a sum of RS. 25,804-12-1 on the date of resignation of the managing agency which sum included the allotment money of RS. 15,000 in respect of the shares.

3. The respondent company is a private limited company and at all material times, it consisted of only two members T. V. T. Govindarajulu Chetty and K. N. Sundara Ayyar. On 20-8-1939 the appellant company made two calls in respect of the shares held in that company, one of Rs. 2 and the other of Rs. 3 per share payable on 1-10-1939 and 1-12-1939 respectively. On 12-8-1940 the directors of the appellant company found that all the shareholders did not pay the calls and passed a resolution on that date granting a further period of two months to pay the call money failing which it was intimated to the shareholders that the shares would be forfeited. The managing agents of the appellant company gave due notice of this resolution to the concerned shareholders and the respondent company which also received one of these notices from the managing agents did not comply with the demand and the directors by their resolution of 25-11-1940 forfeited the shares of the respondent company. Some doubt was raised by the auditors of the company regarding the validity of the forfeiture and the directors, therefore, cancelled the forfeiture and re-entered the respondent company as a member on 31-12-1940. On 20-2-1941 the directors resolved that notice should be issued to Shah Mulchand and Co. informing them that they were in arrears of calls to the extent of Rs. 25,000 and that the said amount should be paid at the registered office of the company on or before 31-3-1941 and that on failure to pay up the said amount on or before the due date, the shares would be forfeited. This resolution though it bears the date 25-2-1941 was passed in circulation. In pursuance of this resolution, a notice bearing date 15-3-1941 but posted on the 17th was issued to the respondent company calling upon them to

pay up the amount of Eg. 25,000 on or before 31-3-1941 and that in default the shares would be forfeited. The notice was delivered on 20-3-1941. The amount was not paid and on 5-9-1941, the directors of the appellant company passed a resolution forfeiting the shares. The application for rectification out of which this appeal arises was filed on 5-3-1946 and the respondent company raised the contention that the forfeiture was invalid and that the register of the company should be rectified by restoring the name of the respondent company in respect of the 5000 shares numbering 15048 to 20047.

4. It would be convenient at this stage to refer to the events that occurred between 30-6-1939 when The respondent company resigned the managing agency and the filing of the present application u/s 38, Companies Act. By an order of the Assistant Registrar of Joint Stock Companies dated 28-8-1941, Shah Mul-chand and Co., Ltd., was struck off the register u/s 247, Companies Act, and the order was published in the Gazette of 9-9-1941. The ground on which the order was made was that the company ceased to function and had become defunct. In this Govindarajulu Chetti, the managing director of the company and Sundara-Ayyar, the director-shareholder, concurred and the order of the Assistant Registrar shows that it was on their statements that the company was not functioning and became defunct that the order u/s 247 was passed. The publication of the notice in the Fort St. George Gazette operates to dissolve the company: vide Section 247 (5). Govindarajulu Chetti was adjudicated insolvent on 23-1-1940 and under the provisions of the Companies Act, his office as director was thereby vacated in law though, in fact, he was conducting himself as if he continued as the managing director notwithstanding his bankruptcy. The notice of forfeiture was issued by Jawahar Mills on 10-9-1941, addressed to the registered address of the respondent company. After the shares were forfeited, the appellant company by the resolution of its directors of 16-11-1941 re-allotted the forfeited shares to various persons some of whom in their turn transferred the shares to others: vide Exs. Rule 14 (a), Rule 14(b). By a notice of 26-4-1941, Jawahar Mills, Ltd., demanded the respondent company to pay the sum of Rs. 25,804-12-1, the balance due to them as per accounts. The notice was issued to Govinda-rajulu Chetti and Sundara Ayyar. In reply to this,

Sundara Ayyar wrote to the advocate of the appellant company on 7-3-1941 repudiating his personal liability for the amount and alleging that the

company alone was liable and that Govindarajulu Chetti was in possession of the accounts and the records of the company and was the person

who really represented the company. As Jawahar Mills, Ltd., did not receive any payment, they were obliged in December 1941 to file O. P. No.

10 of 1942 for restoration of the respondent company to the register and for winding up. As there was default also in the payment of Income Tax,

the Income Tax authorities concerned also filed O. P. No. 11 of 1942 for a similar relief. To both these petitions Sundara Ayyar was made a

party; Govindarajulu Chetti was represented by the Official Receiver of Salem as he was on that date an insolvent. The petitions were opposed but

were not allowed to be tried. O. P. No. 10 of 1942 was settled by Sundara Ayyar by paying a sum of ES, 11,000 to the appellant company in full

settlement of all their claims against Shah Mulchand Co., Ltd. Leave was granted by an order dated 2-4-1942 for the withdrawal of the petition.

O. P. no. 11 of 1942 was also settled by paying the Income Tax due to the Income Tax authorities and on 23-6-1942, the petition was disposed

of by recording the settlement.

5. Having thus successfully prevented the restoration of the company and settled the large claim of Jawahar Mills Ltd., for Rs. 11,000, Sundara

Ayyar instituted on 27-6-1942, two days after the order in O. P. No. 11 of 1942, a suit, O. S. No. 39 of 1942, Sub-Court, Salem, against

Jawahar Mills Ltd., and one Palaniappa, who was impleaded as defendant 4, in which he claimed a declaration that the forfeiture of the shares by

Jawahar Mills was illegal and inoperative and a mandatory injunction directing them to restore the name of Shah Mulchand in the register. There

was also an alternative claim for damages against the Jawahar Mills which was defendant 1 and defendant 4 Palani-appa, for a sum of Rs. 23,000.

This Palaniappa, it must be mentioned here, was a partner of the firm which succeeded as the managing agent of Jawahar Mills after Shah

Mulchand Co. resigned on 30-6-1939. On 29-6-1939, an agreement was entered into between Sundara Ayyar and Govindarajulu Chetti on the

one hand and Palaniappa on the other, whereunder it was agreed by Sundara Ayyar and Govindarajulu Chetti that the 5000 shares of Shah

Mulchand and Co., Ltd., should be transferred to Palaniappa and that Palaniappa should pay the further calls due in respect of those shares to

Jawahar Mills Ltd. In the plaint it was claimed that by reason of the default of Palaniappa in not carrying out the terms of that arrangement, the

shares became forfeited and that therefore they were entitled to claim damages. This suit was dismissed on 17-11-1943 by the Sub-Court on the

ground that Sundara Ayyar was not entitled to maintain the suit as Shah Mulchand and Co. Ltd., ceased to exist and the shares were held by Shah

Mulchand and Co. Ltd., in its corporate character and not by Sundara Ayyar in his individual capacity. Against this decision Sundara Ayyar

preferred an appeal to this Court (A. S. No. 258 of 1944). The appeal was also dismissed against defendant I Jawahar Mills Ltd., on the ground

that as the company was not restored in the register, Sundara Ayyar was not entitled to claim any relief in respect of the forfeited shares. The suit

was, however, remanded as against Palaniappa as Sundara Ayyar apparently wanted to pursue the remedy against him on the footing that the

forfeiture was valid. The appeal was disposed of in this Court on 12-2-1945. In between the dismissal of the suit in 1943 and the disposal of the

appeal in 1945, Sundara Ayyar filed O. P. No. 199 of 1944 on the Original Side on 21-8-1944 to revive the company and to wind it up. Four

days alter the disposal of the appeal, the learned Judge who made the order now under appeal also dealt with O. P. No. 199 of 1944 and passed

an order directing the restoration to the register of Sha Moolchand and Co., Ltd., and its winding up, mainly on the ground that the question of the

validity of the forfeiture of shares had to be considered in a proper proceeding after the restoration of the company. After this order was made, the

liquidator with the permission of the Court filed the present application u/s 38, Companies Act, for rectification.

6. The main ground on which the application is filed was that the forfeiture was invalid as the notice of 15-3-1941 did not comply with the

requirement of the regulation of the company that the notice should name a further day not earlier than the expiration of 14 days from the date of

the notice on or before which the payment required by the notice is to be made, as it fell short of the period of 14 days by one day. There were

also other grounds alleged in the affidavit filed in support of the application, but they are not material now. The application was supported by the

affidavits of Sundara Ayyar and Govindarajulu Chetti whose adjudication was annulled in 1944. The appellant company resisted the application on various grounds. According to the appellant, the forfeiture was valid and the claim of Sha-Mulchand and Co. was barred by limitation and that even if the forfeiture was irregular and therefore voidable, by reason of the conduct of Sundara Ayyar and Govindrajulu Chetti the applicant was precluded from claiming rectification.

7. The learned Judge held that the forfeiture was irregular as the notice of 15-3-1941 did not comply with the requirement of the articles as it was short by one day. The pleas of the appellant regarding limitation, waiver, acquiescence and laches were all overruled. Notwithstanding the re-allotment of the shares by Jawahar Mills Ltd. after the forfeiture and notwithstanding that there was a reduction of the capital of Jawahar Mills, with the approval of the Court on 11-8-1944 in O. P. No. 84 of 1944, the learned Judge was of opinion that Sha Mulchand and Co. should be registered in respect of 5000 unissued Rs. 10 shares out of the 16,000 unissued Rs. 10 shares available with the company under the reduction scheme, though the learned Judge did not think fit to grant any interest to Jawahar Mills in respect of the calls (Rs. 25,000) or direct Jawahar Mills Ltd. to pay the dividends in respect of the shares forfeited. There was a direction that the respondent company should pay a sum of Rs. 25,000 after the insertion of their name in the register as the owner of 5000 unissued shares.

8. In this appeal by Jawahar Mills Ltd. it is not now disputed that the forfeiture was irregular, but the contention urged is that by reason of this irregularity, the forfeiture was only voidable and not void and that it was open to the respondent company to waive or abandon their right to dispute the legality of the forfeiture and that in fact by their conduct they have done so, that the claim to rectify the register was barred by limitation and that in any event rectification was impossible, because the shares are not now available in specie with the appellant company and that it is impossible, therefore, to rectify the register, particularly as the transferees of the shares are not impleaded as parties to these proceedings.

9. The power of forfeiting the shares for non-payment of calls is conferred upon the company by its regulations which constitute a contract

between the company and the shareholders. The power, therefore, has to be exercised strictly in accordance with the provisions of the contract

contained in the regulations. The articles of Jawahar Mills Ltd., regarding calls and forfeiture are identical with the articles in Table A of the

Companies Act though numbered differently and in the course of the arguments before us, the articles contained in Table A of the Companies Act,

were referred to as correctly representing the articles of Jawahar Mills Ltd. The attempt on the part of the advocate for the respondent is to

establish that the forfeiture was void, as according to him, the notice contemplated by Article 25, was really a condition precedent for the accrual

of the power to forfeit and does not form part of the limitations on the exercise of the power. If the forfeiture were void, the respondent com-pany

continues to be shareholder and the respondent is entitled to ignore the forfeiture altogether. If, on the other hand, it is voidable, the forfeiture is

good until it is avoided and Jawahar Mills Ltd., would be entitled to act on the footing that the forfeiture was valid until it is avoided. The right of

avoidance, of course, vests in the shareholder and the com-pany cannot take advantage of the irregularity of the forfeiture and avoid it when it

suits its purpose. It is not open to the company to get rid of an act which it has all along treated as valid and operative.

10. There is no decided case in the reports in which the validity of a forfeiture was canvassed in a proceeding for rectification. Palmer on Company

Law, 1942 Edn. at p. 110 refers to the case of Yatalyfera Gas Co., (1887) W. N. 30 as an instance in point, but on a reference to the report the

citation does not seem to be correct. There are no decisions, English or Indian, enabling us to determine the line of demarcation between the

accrual of the power and the exercise of the power. That there is a distinction between the power of a company to forfeit shares and the exercise

of that power is clear from the decision of the Judicial Committee in AIR 1938 284 (Privy Council) . Articles 24 to 30 entitle ""forfeiture of shares

in Table A, in our opinion, lay down the further procedure to be followed after there was default in making the payment of a call or the instalment

of a call. Article 2 empowers the directors to make calls upon the member in respect of money unpaid on the shares and lays down also the

limitations under which the call should be made. A notice of at least 14 days should be given to each member specifying the time of payment and

the amount payable. Article 24 authorises the directors, if there is a default in the payment of a call or the instalment of a call, to serve a notice on the member who was in default requiring him to pay the call which was unpaid and Article 25 contains the formalities to be observed for issuing such notice. It requires that a further day should be named in the notice which is not earlier than the expiry of 14 days from the date of the notice on or before which the payment required by the notice is to be made, and that in the event of non-payment before the time fixed, the shares would be liable to be forfeited. Under Article 26 if there is non-compliance with the notice under Article 24, by the member, the directors are authorised to forfeit the shares by a resolution to that effect. The power to forfeit is complete, in our opinion, in view of the language of Article 24, when there is a default in the payment of a call after notice under Article 12, was issued and the date fixed for payment had expired. An option accrues to the directors either to waive the default and be satisfied with the claim to interest or if capital is required for the purpose of the business to enforce the payment by forfeiture. It would be open under Article 27 of the regulations, to the directors to sell the share or dispose of the share in any manner they think fit. The object, therefore, of the regulations relating to forfeiture is to enforce payment of the call and thus enable the directors to collect the capital speedily. The notice under Article 25, in our opinion, is only a part of the exercise of the power of forfeiture which had accrued at the moment there was a default in payment of the call. It cannot, therefore, be treated as part of the power itself the non-compliance with which makes the forfeiture void. In our opinion, the conditions precedent for the accrual of the power are a valid call and a default in payment. If the calls had not been duly paid and there was a default in payment within the period fixed, the power of the directors to forfeit the shares then accrues and arises. Thereafter that power should be exercised in the manner provided in Articles 24 to 30. The contention, therefore, urged on behalf of the respondent that in the present case the forfeiture was void cannot be accepted.

11. If the exercise of the power was irregular, the forfeiture would be voidable. From the point of view of the shareholder, the technicalities in the matter of forfeiture of shares have always been strictly enforced. Such insignificant mistakes as claiming interest from a wrong date, *Johnson v.*

Lyttle's Iron Agency, (1877) 5 Ch. D. 687 : 46 L. J. Ch. 786 the omission in the notice of forfeiture to specify the place of payment and not

giving correctly the dates on which the calls were due, *Kanduri Lakshmiah Chetty and Another Vs. Adoni Electric Supply Co. Ltd.* by Managing

Agents T.R. Rao and Co. by partner and director, N. Vembu and Another, have been held to make the forfeiture invalid. As observed by James

L. J., in *Johnson v. Lyttle's Iron Agency*, (1877) 5 Ch. D. 687 : 46 L. J. Ch. 786:

It was an established rule of the Court of Chancery and of Courts of Common Law that no forfeiture of property could be made unless every

condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate; it

is, therefore, bad and the forfeiture is invalid.

Lord Romer observed in AIR 1938 284 (Privy Council) :

This may seem to be somewhat technical. But in the matter of forfeiture of shares, technicalities must be strictly observed. And it is not, as is

sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions

prescribed for forfeiture. For the forfeiture of shares may result in a permanent reduction of the capital of a company," (Page 18).

The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares

has arisen, the articles of association usually contain provisions as to the sending of notice and the like that may be regarded as having inserted

merely for the protection of the shareholders affected. Such provisions may properly be regarded as directory and capable of being waived by the

individual shareholder. But no waiver by him can confer upon the company or its directors the power of forfeiture that they do not possess, as for

example, a power to forfeit shares for non-payment of calls that are not yet due." (Page 19).

Street on the doctrine of ultra vires at pp. 332 to 337 gives other instances where the conditions of the forfeiture were strictly enforced by Courts.

Such informalities when relied on by members whose shares have been forfeited have been treated, therefore, as material. But the same rule does

not apply if they were relied on by the company or its liquidator, as in such a case, they were treated as immaterial. As pointed out by Street at p.

when it is stated that the right to forfeit is *stricta juris*, the rule must be taken to apply only to cases where the forfeiture, if a word may be coined,

raises the objection On the other hand, where the liquidator has urged that the forfeiture is bad on the grounds that it was declared before the

expiry of the period of grace it has been held in all cases that the informalities were not fatal.

The reason is that it is not open to the company to plead the invalidity of its own acts as it has all along treated the forfeiture as valid. The

irregularity complained of in the present case of the shortness of notice under Article 25 results in making the forfeiture voidable at the instance of

the shareholder.

12. The forfeiture being voidable, the right of avoidance vested in Sha Mulchand and Co. It was argued by Mr. V. K. Thiruvengkatachari on behalf

of the appellant that this right to avoid is barred by limitation. There is no period of limitation prescribed for initiating proceedings for rectification of

a register u/s 88, Companies Act. It was, however, agreed before us that if a suit for relief of rectification is barred by limitation, the relief u/s 38

should be refused. According to the appellant, the article of the Limitation Act applicable to such a case is Article 48 or Article 49. u/s 28, Com-

panies Act, the shares or other interest of a member in a company is moveable property. The proper relief to be claimed in a suit for rectification is

a declaration that the forfeiture of the shares is illegal and inoperative and a mandatory injunction directing Jawahar Mills Ltd., to restore the name

of Sha Mulchand and Co., as a shareholder in the company's register. These were in fact the prayers in the plaint in O. S. No. 89 of 1942 filed by

Sundara Ayyar as plaintiff. Article 48, Limitation Act, is restricted to recovery of possession of specific moveable property which has been lost or

acquired by theft or by dishonest misappropriation or conversion. The conversion need not be dishonest--L. P. E. Pugh v. Ashutosh Sen, 8 Pat.

516: AIR 1929 P. C. 69. Article 49 applies to other specific moveable property whether it is for recovery of possession or for com-pensation for

wrongful taking or injuring the property or wrongfully detaining it. Under the terms of the Contract Act and the Sale of Goods Act, the shares are

also ""goods"" within the meaning of these Acts, vide *Maneckji Pestonji v. Wadilal*

Sarabhai & Co., 50 Bom. 360 : A. I. R. 1926 P. C. 38.

Therefore, it must be taken that the shares in question are specific moveable property within the meaning of Arts. 48 and 49, Limitation Act. The

reliefs for declaration and injunction are not within those articles as in both the articles the relief that is contemplated is either possession or

recovery of money as compensation. These two articles provide the period of limitation for actions which are described under English law as

actions for detinue and trover. If the object of the suit or action is to recover possession of moveable property which was unlawfully detained it is

an action for detinue. If on the other hand, the object is to recover damages for detention, it is trover. If the claim is for damages for conversion

which is also a form of trover, it falls within the purview of Article 48. In our opinion, therefore, an action of the nature contemplated by Section

38, Companies Act, for rectification of the register does not fall within the purview of either of the articles. In the absence of any specific article, the

only alternative is to apply the residuary article, Article 120, Limitation Act. The notice of forfeiture was issued to the respondent company on 10-

9-1941 by which date the respondent company ceased to exist. It was revived on 16-2-1945 by the order in O. P. No. 199 of 1944. At the

moment when the cause of action accrued, the respondent company was not in existence and, therefore, there is no person in existence capable of

instituting the suit until 16-2-1945. On the analogy of the principle of Section 17, Limitation Act, it would seem that limitation does not begin to run

until 16-2-1945 when the person capable of instituting an action came into existence. Apart from this even if the cause of action dates from 5-9-

1941, the date of forfeiture, the present application which was filed on 5-3-1946 is within the period of six years under Article 120, Limitation Act,

and the action, therefore, was within time. It may be a question for consideration, if more than six years had elapsed from the date of forfeiture

whether respondent company which consisted only of two share-holders who were also directors, one of them being even a managing director,

could take advantage of the non-existence of the company from 9-9-1941 till 16-2-1945 as it would have been open to the share-holders to have

taken appropriate proceedings as they did in O. P. No. 199 of 1944 to revive the company earlier. They had two opportunities earlier in O. P.

Nos. 10 and 11 of 1942 to revive the company, but they opposed it. It is not open to a person who had the right or the remedy to bring into

existence a person capable of instituting a suit or initiating a proceeding, to extend the period of limitation by postponing the steps to bring into

existence a person capable of instituting a suit or proceeding. However, it is unnecessary in this case to decide that question as even if the cause of

action began to run from 5-9-1941, the present proceeding would be in time as it is within six years. We are, therefore, of opinion that the learned

Judge was right in holding that the present claim is not barred by limitation and that it is governed by Article 120, Limitation Act.

13. It was next argued for the appellant that by reason of long delay of nearly five years, the respondent company is disentitled to claim

rectification. Where a period of limitation is prescribed for a suit or proceeding, mere delay is no bar unless it is of such a character as to lead to

an inference of abandonment of the right or unless it is established that the person, against whom the action or proceeding is instituted was actually

prejudiced by reason of such delay. The appellant relied also upon acquiescence, waiver and estoppel before the learned Judge, but for reasons

given by the learned Judge, we agree with him that none of these grounds have been established in the present case. The question of abandonment

of the right and prejudice to the appellant by reason of delay, however, stands on a different footing.

14. Courts in England have always viewed with disfavour belated claims for relief against forfeiture by share-holders whose shares have been

forfeited and required that the parties interested in the shares should be vigilant and active in asserting their rights. The share money which the

share-holder defaulted to pay was required for the adventure of the company of which he was a share-holder and it is not open to him to stand by

without payment and see whether the company prospers in business or suffers reverses and ultimately to assert his rights when it is found that the

company is affluent and is paying high dividends. The capital is required for the business of the company and the share-holder must subject his

money, along with the others, to the ordinary risks of the business. The fact that the company would be entitled to interest on unpaid calls under the

regulations of the company is no consolation to the company when the capital was most needed for the successful running of the business. Vice

Chancellor Knight Bruce considered this question. at considerable length in *Prendergast v. Turton*, (1841) 1 Y. & C. C. C. 98:62 E. R. 807. The

question came up for consideration also in *Clarke and Chapman v. Thomas Hart*, 6 H. L. C. 632 : 10 E. R. 1443. It is the case of a mining

company and the observations of Lord Chancellor (Lord Chelmsford) at p. 1453 of the report are apposite :

The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital and

in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern. And, therefore,

where parties under these circumstances stand by and watch the progress of the adventure to see whether it is prosperous or the contrary,

determining that they will intervene only in case the affairs of the mine should turn out prosperous, but determining to hold off if a different state of

things should exist, Courts of equity have said that those are parties who are to receive no encouragement; that if they come to the Court for relief,

its doors shall be closed against them; that their conduct being inequitable, they have no right to equitable relief.

In *Rule v. Jewell*, (1881) 18 Ch. d. 660 : 29 W. R. 755, there was a delay of six years in claiming that the shares were not regularly forfeited and

that they were entitled to be restored and the relief was refused on the ground that the action of the plaintiff in lying by was entirely analogous to the

lying by in the case of *Prendergast v. Turton*, (1841) 62 E. R. 807 : 1 Y. & C. C. C. 98 in order to see whether the concern would ultimately turn

out sufficiently profitable to make it worthwhile to assert their claim as shareholders. These principles were also accepted by the Privy Council

and applied in *Jones v. North Vancour Land and Improvement Co.*, 1910 A. C. 317: 79 L. J. P. C. 89. That was an action by a husband and

wife for a declaration that shares standing in the name of the wife were not validly forfeited by the company. The husband was also a director of

the company and was a party to the resolution of the Board making calls on the shares and also to a subsequent resolution forfeiting the shares.

The notice of the call and the liability of the shares to forfeiture if unpaid was posted to the wife's address which was the address given by the

husband. The complaint was that the shares were not validly forfeited. The company was in financial embarrassment for some time, but

subsequently became prosperous and the share began to increase in value. 12 years after the call, the action was brought to declare the forfeiture

invalid. The action was described by the Privy Council in these words :

A proceeding more unmeritorious, more cynically audacious, could not well be conceived, even if the notices given were, in fact, defective in

form, which, in their Lordships' opinion, for the reason hereafter stated, they are not, or if the service of these notices were irregular, which their

Lordships think, it was not. The principles laid down in *Prendergast v. Turton*, (1841) 1 Y. & C.C.C. 98 : 62 E. R. 807 and by Lord Lyndhurst

on the appeal, and in the line of cases which followed it, fortunately it would seem, in the interest of that honesty and fair dealing which ought to

regulate the conduct of commercial affairs and the management of companies such as this, are strong enough to defeat such mischievous designs.

These authorities show that the plaintiffs must in this case be held to have by their own conduct disentitled themselves to the relief they pray for.

15. (His Lordship narrated the background of the proceedings for rectification and proceeded) : It is with this background that the conduct has to

be judged. The present proceedings are conducted only for the benefit of the two share-holders and for the benefit of no other. In passing it may

be mentioned that in O. P. No. 199, the learned Judge directed that Jawahar Mills Ltd. should prove for the balance of the amount due to them in

the liquidation proceedings notwithstanding the compromise in O. P. No. 10.

16. It will be seen, therefore, that the conduct of these two share-holders is analogous to the conduct of the plaintiffs in the cases referred to

above. They had no idea of reviving the company till 1942 and proceeded or acted on the footing that the forfeiture was valid. No doubt, the right

to avoid the forfeiture was in the company Sha Mulchand and not in the share-holders. But it was open to the share-holders to bring into existence

the company if they intend to question the forfeiture and they must have been well aware of the position that they themselves could not take any

proceedings to get rid of the forfeiture. Jawahar Mills Ltd. were prejudiced as they had parted with the shares on the footing that the forfeiture was

valid and there was also a reduction in the capital with the approval of the Court on 11-8-1944 in O. p. No. 84 of 1944. They gave up in O. P.

No. 10 of 1942 the balance of the liability of Sha Mulchand to Jawahar Mills Ltd.

In O. P. No. 199 of 1944, they were allowed to prove in

liquidation for the balance due but even now it is not certain whether they would get sixteen annas in the rupee in the liquidation proceedings in

respect of that amount. By reason of this long delay in reviving the company and in taking proceedings u/s 38, Companies Act, Jawahar Mills Ltd.

have put themselves in a situation in which it is impossible for them to restore Sha Mulchand Ltd. to the register in respect of the 5000 shares

numbering 15048 to 20047. In view of these facts, if the applicants were Sundara Aiyar and Govindarajulu Chetti, it would have been a case in

which the relief should be refused in the light of the principles already adverted to.

17. Is the company affected by the conduct of its share-holders in view of the doctrine in *A. Salomon & Co. Ltd.*, 1897 A. C. 22 which refused to

identify a company with its controlling share-holders. The tendency of modern decisions in England is to "lift the veil of corporate personality" and

disregard the corporate form. In other words, the curtain of the juristic personality of the corporation is lifted and the conduct of individuals behind

the mask of juristic person is considered. A very illuminating discussion of this question is found in a recent book on Legal Theory by W.

Friedmann at pp. 375 and 377. For various purposes, the corporate existence of the company is ignored, e. g., where the corporate form is used

to evade the Income Tax and a recent instance of the application of this principle of piercing the veil of corporate personality is *Smith, Stone and*

Knight v. Birmingham Corporation, I. L. R (1939) All Eng 116 : 161 L. T. 371 in which it was decided that the possession of a subsidiary

company was really on behalf of the parent company which was entitled to compensation under the Land Clauses Consolidation Act (1845),

Section 121. It was stated in that case by Atkinson J. (at page 121) :

It seems, therefore, to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the

business as the company's business or as its own.

The same doctrine of "lifting the corporate veil" is also adverted to in another recent book on the Province and Function of Law by Julius Stone.

Mr. Thiruvengkatachari, the learned advocate for the appellant, in his able argument has drawn our attention to these authorities and on an

examination of the principles therein enunciated, it seems to us that it is too late in the day to still adhere to the strict formalism of Salomon's case,

1897 A. C. 22, while the facts stare us in the face and the corporate personality is utilised to play a game of hide and seek. Disagreeing, therefore,

with the learned Judge, we are of opinion that by reason of this long delay which caused prejudice to Jawahar Mills Ltd., the respondent company should not be granted the relief now claimed.

18. Apart from this there is a more insuperable difficulty in granting the relief to the applicant. Jawahar Mills acted all along on the footing that the

forfeiture was valid and effective, re-allotted the shares and transferred them to various other persons. The capital of the company was reduced

with the approval of the Court on 11-8-1944 in O. P. No. 84 of 1944. The shares, therefore, are not available in specie with Jawahar Mills Ltd.

The learned Judge saw this difficulty and stated in the judgment that it was agreed by both parties before him that in the circumstances it was

impossible to make an order of rectification. Notwithstanding this conclusion of the learned Judge, he directed Jawahar Mills Ltd., to recognise the

applicant as shareholder in respect of 5000 shares out of the 16000 unissued ES. 10 shares of Jawahar Mills which came into existence under the

reduction scheme. It is difficult to find any legal basis for this substitution. The principle of substituted security recognised by decisions of the Privy

Council and this Court has no application. It was argued on behalf of the respondent that Mr. Thiruvenkatachari the learned advocate for the

appellant admitted before the learned Judge that the shares could be so substituted. On reading the judgment of the learned Judge and after hearing

Mr. Thiruvenkatachari on this question, we are unable to agree with the contention of the learned advocate for the respondent that Mr.

Thiruvenkatachari agreed to the substitution of the shares for the share forfeited. He throughout contended that as the shares were re-allotted to

strangers who are not parties to the proceedings, it was not possible to set aside the forfeiture, and he also relied upon the fact that the share

capital of the company was reduced with the approval of the Court. Having contended so strenuously before the learned Judge that it was not

possible to restore the name of Sha Mulchand to the register, it is inconceivable that he would have agreed to give up the case of his client. He

seems to have agreed only as an alternative that if all his contentions were overruled and the learned Judge thought that notwithstanding the

difficulty in the way of granting the relief for rectification, the applicant company should be restored to the register, the only shares available being

the 16000 shares of Rs. 10 each unissued, the applicant company could be recognised as & share-holder in respect of 5000 but of those shares.

The learned Judge stated in his judgment:

It is agreed by both parties that the proper order will be for the applicant company to be placed on the register in respect of 5000 of the unissued

Rs. 10 shares and I order accordingly.

So, counsel was driven to the necessity as a last resort of helping the Court with the solution of a difficulty as to what the Court should do when the

Court had made up its mind to grant the relief. The Only course open and Suggested by the counsel was to recognise the applicant company for

the 5000 of the unissued shares of 16000. We do not, therefore, think that the counsel is precluded from raising the point that it is impossible to

rectify the register in the circumstances of this case.

19. The principles governing specific restitution of moveable property are contained in Sections 10 and 11, Specific Relief Act. If for reasons

beyond the control of the defendant in an action, the property is not available, it is impossible to compel him to deliver possession of the specific

moveable property. The only right in such an event of the party injured is to claim the value of the property. In a proceeding u/s 38, Companies

Act, the Court has no jurisdiction to grant the value of the property. In a proceeding u/s 38, the company can only be ordered to pay damages

wheat their register is ordered to be rectified. In other words, it is only as incidental to the relief of rectification that damages can be granted, see In

re Ottos Kopja Diamond Mines Ltd., (1893) 1 Ch. 618.

20. Further, the Court cannot order rectification of the register in respect of the particular shares claimed by the applicant in the absence of third

parties whose rights will be affected by the rectification. If the applicant's right is only to get the particular shares and not more, he cannot get that

relief in these proceedings as he has not impleaded as parties the transferees of the shares, notwithstanding such information was available on

record as the appellant filed documents furnishing the necessary information, see

Ontario Jockey Club Ltd. v. McBride, 1927 A. C. 916 : A. I. R.

1928 P. C. 291 and In re Great Britain Insurance Corporation Ltd.; Ex-parte Brookdroff, (1921) 124 L. T. 194.

21. We are, therefore, unable to agree with the order passed by the learned Judge. The appeal has, therefore, to be allowed and the order of the

learned Judge set aside with taxed costs throughout. We understand that in pursuance of the order of the learned Judge, the applicant company

paid a sum of Rs. 25000 to the appellant and there should be a refund of the amount by the appellant to the person who paid it. This order will be

communicated to the Registrar of Joint Stock Companies, as we understand that the rectification of the register directed by the learned Judge has

been carried out in the registers of the Registrar of Joint Stock Companies, we certify for two counsel.

22. O. S. A. No. 50 of 1947: -- This is an appeal by Govindarajulu Chetty who owned 1000 ordinary shares of Rs. 10 each in Jawahar Mills Ltd.,

and which shares were also forfeited for non-payment of the calls. The learned Judge dismissed the application on the ground that the forfeiture

was valid and that the application was also barred by limitation. The notice u/s 25 was properly issued and there is no complaint regarding it. The

only ground urged was that the resolution of the directors of 12-8-1940 provided that the defaulting shareholders should pay the amount within a

period of two months and that that period should be counted from the date of notice and the notice u/s 25 should have been in conformity with the

resolution of the directors. The notice gave fourteen days and fixed also the date with-in which the call money should be paid. We agree with the

learned Judge that the notice of 16th September meets with the requirements of the articles and is valid. For the reasons given by the learned

Judge, we think that the decision is correct and the appeal should be dismissed with taxed costs.