
(1949) 03 MAD CK 0012
In the Madras High Court

The Jawahar Mills, Ltd.

APPELLANT

Vs

Sha Mulchand and Co. Ltd.

RESPONDENT

Date of Decision : 11-03-1949

Acts Referred:

Companies Act, 1956 — Section 38

Citation : (1949) 2 MLJ 88

Hon'ble Judges : Satyanarayana Rao, J

Bench : Division Bench

Judgement

Satyanarayana Rao, J.—This is an appeal from the judgment of Clark, J., arising out of proceedings u/s 38 of the Indian 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 Sha Mulchand & Co., Ltd., to the said register in

respect of 5,000 shares numbering 15,048 to 20,047.

Jawahar Mills, Ltd., are the appellants in this appeal. The application was: filed by the Liquidator of Sha Mulchand & 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 Indian Companies Act. Sha Mulchand & Co., Ltd., were the managing

agents of Jawahar Mills, Ltd., from the starting of the company till 30th June, 1939, on which date they resigned the managing agency. On that day

Sha Mulchand & Co., Ltd., held 5,000 ordinary shares of Rs. 10 each in Jawahar Mills, Ltd., bearing Nos. 15,048 to 20,047 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, Ltd., a sum of Rs. 2,5804-12-1 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 the 20th August, 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 the 1st October, 1939 and 1st December, 1939, respectively. On the 12th August, 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 20th February, 1941,

the directors resolved that notice should be issued to Sha Mulchand & Co., Ltd., 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 31st March, 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 25th February, 1941, was

passed in circulation. In pursuance of this resolution, a notice bearing date 15th March, 1941, but posted on the 17th was issued to the

respondent-company calling upon them to pay up the amount of Rs. 25,000 on or before 31st March, 1941, and that in default the shares would

be forfeited. The notice was delivered on the 20th March, 1941. The amount was not paid and on the 5th September, 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 the 5th

March, 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 5,000 shares numbering 15,048 to 20,047.

4. It would be convenient at this stage to refer to the events that occurred between 30th June, 1939, when the respondent-company resigned the

managing agency and the filing of the present application u/s 38 of the Indian Companies Act. By an order of the Assistant Registrar of Joint Stock

Companies, dated 28th August, 1941, Sha Mulchand & Co., Ltd., was struck off the register u/s 247 of the Indian Companies Act and the order

was published in the Gazette of 9th September, 1941. The ground on which the order was made was that the company ceased to function and had

become defunct. In this Govindarajulu Chetty, 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 Ghetty was adjudicated insolvent on the 23rd January, 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, Ltd., on the 10th September, 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 16th November, 1941, re-allotted the

forfeited shares to various persons some of whom in their turn transferred the shares to others, vide Ex. R-14 (a) and R-14(b). By a notice of the

26th April, 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 Govindarajulu Chetty and Sundara Ayyar. In reply to this, Sundara Ayyar wrote to the advocate of the

appellant-company on the 7th May, 1941, repudiating his personal liability for the amount and alleging that the company alone was" liable and that

Govindarajulu Chetty 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. 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 Chetty

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 Rs. 11,000 to the appellant-company in full settlement of all their

claims against Sha Mulchand & Co., Ltd. Leave was granted by an order dated 2nd April, 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 the 25th June, 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 the 27th June 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 the fourth defendant, in which he claimed a declaration that the forfeiture of the

shares by Jawahar Mills, Ltd., was illegal and inoperative and a mandatory injunction directing them to restore the name of Sha Mulchand & Co.,

Ltd., in the register. There was also an alternative claim for damages against the Jawahar Mills, Ltd., which was the first defendant and the fourth

defendant Palaniappa, for a sum of Rs. 25,000. This Palaniappa, it must be mentioned here, was a partner of the firm which succeeded as, the

managing agent of Jawahar Mills, Ltd., after Sha Mulchand & Co., Ltd., resigned on the 30th June, 1939. On the 29th June, 1939, an agreement

was entered into between Sundara Ayyar and Govindarajulu Chetty on the one hand and Palaniappa on the other, whereunder it was agreed by

Sundara Ayyar and Govindarajulu Chetty that the 5,000 shares of Sha Mulchand & Co., Ltd., should be transferred to Palaniappa and that

Palaniappa should pay the further calls due in respect of those shares to Jawahar Mills, Limited. 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 the 17th November, 1943, by the Sub-Court on the ground that Sundara Ayyar was not entitled to maintain

the suit as Sha Mulchand & Co., Ltd., ceased to exist and the shares were held by Sha Mulchand & 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 the first defendant 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 the 12th February, 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 the 21st August 1944, to revive the company and to wind it up. Four days after 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 Mulchand & 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 of the Companies Act for rectification.

6. The main ground on which the application is filed was that the forfeiture was invalid as the notice of 15th March, 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 exercise of the power. If the forfeiture were void, the respondent company 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 Limited 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 company

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.

7. The learned judge held that the forfeiture was irregular as the notice of 15th March, 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 Jawhar 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 the 11th August, 1944, in O.P. No. 84 of 1944, the learned judge was of opinion that Sha Mulchand & Co.,

Ltd., should be registered in respect of 5,000 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, Ltd., 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 5,000 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 Limited. 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 company

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 Limited 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 company 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 edition) at page no refers to the case of Yatalyfera Gas Company 1887 Weekly Notes 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 Premila Devi's case ILR (1939) Lahore 1 : (1939) 1 M.L.J. 98

(P.C.) Articles 24 to 30 entitled ""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 12 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 make 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 article's

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, 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, *Lakshmiah Chetty v. Adoni Electric Supply Company Limited* (1944) 1 M.L.J. 107 : L.R. 1944 Mad. 796.

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:

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 *Premila Devi's Case* ILR (1938) Lah. 1 : (1939) 2 M.L.J. 98 (P.C.)

This may seem to be somewhat technical. But in the matter of forfeiture of share, 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.

* * *

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 been

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.

Street on ""The doctrine of ultra vires"" at pages 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 page 332

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 is a word that 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.

12. 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.

13. The forfeiture being voidable, the right of avoidance vested in Sha Mulchand and Co. It was argued by Mr. V.K. Tiruvenkatachari 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 38 of the 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 49. u/s 28 of the

Companies 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, Limited

to restore the name of Sha Mulchand and Company as a shareholder in the company's register. These were in fact the prayers in the plaint in O.S.

No. 39 of 1942 filed by Sundara Ayyar as plaintiff. Article 48 of the 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 (1928) 56 M.L.J. 517 : L.R. 56 IndAp 93 : L.R. 8 Pat. 516 (P.C). Article 49 applies to other specific moveable property

whether it is for recovery of possession or for compensation 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 those Acts, vide *Maneckji Pestonji Bharucha*

and Another Vs. Wadilal Sarabhai and Company and Maganlal Chunilal Ghia, . Therefore, it must be taken that the shares in question are specific moveable property within the meaning of Articles 48 and,49 of the 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 of the 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 of the Limitation Act. The notice of forfeiture was issued to the respondent-company on the 10th September, 1941, by which date the respondent-company ceased to exist. It was revived on the 16th February, 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 16th February, 1945. On the analogy of the principle of Section 17 of the Limitation Act, it would seem that Limitation does not begin to run until 16th February, 1945, when the person capable of instituting an action came into existence. Apart from this even if the cause of action dates from the 5th September, 1941, the date of forfeiture, the present application which was filed on 5th March, 1946, is within the period of six years under Article 120 of the 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 shareholders who were also directors, one of them being even a managing director, could take advantage of the non-existence of the company from 9th September, 1941, till 16th February, 1945, as it would have been open to the shareholders 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 5th September, 1941, the present proceeding would be in time as it is within six years. We are therefore of opinion that that learned Judge was right in holding that the present claim is not barred by limitation and that it is governed by Article 120. of the Limitation Act.

14. 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.

15. Courts in England have always viewed with disfavour belated claims for relief against forfeiture by shareholders 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

shareholder defaulted to pay was required for the adventure of the company of which he was a shareholder 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 shareholder 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. Hart* (1858) 4 H.L.C. 632 : E.R. 1443. It is the case of a mining company and

the observations of Lord Chancellor (Lord Chelmsford) at page 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 interevene 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. 660, 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) 1 Y. & C.C.C. 98 : 62 E.R. 807 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 Vancouver Land and Improvement Company (1910) A.C. 317 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. Twelve 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 Lyndhurs 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.

16. In the present case, Sha Mulchand and Co., though it has a separate corporate-existence, is practically identical with the two shareholders.

The shares were acquired in 1938 during the course of the managing agency and the accounts maintained disclose that even the allotment money of

Rs. 15,000 was not paid by the director-shareholders of Sha Mulchand and Company. After resignation of the managing agency in 1939 it was

found that they owed to Sha Mulchand & Co., Ltd., more than Rs. 25,000. The two shareholders concurred and were anxious to have the

company dissolved u/s 247 of the Indian Companies Act and obtained an order of dissolution on the 9th September, 1941. One of them

Govindarajulu Chetty became an insolvent in 1940. There is no reliable evidence on record to show, that this fact was ever intimated to Jawahar

Mills, Ltd. Govindarajulu Chetty, though he was legally disqualified to be a director, continued to act as managing director till the date of the

dissolution of the company. It is obvious that the company was in financial embarrassment and the shareholders had no where-withal to pay the

calls in respect of the shares. It was then not clear whether Jawahar Mills, Ltd., would prosper and the shares would appreciate in value though it

is in evidence that in later years Jawahar Mills, Ltd., paid high dividends and the shares also appreciated in value. When Jawahar Mills, Ltd.,

attempted in O.P. No. 10 of 1942, to revive the company and to have it liquidated, the attempt was resisted and Jawahar Mills were obliged to

accept a compromise for Rs. 11,000 giving up their claim for the balance out of Rs. 25,000 and odd. The O. P. filed by the Income Tax

authorities was also opposed and the resuscitation of the company was successfully prevented by paying the amount due as tax to the Income Tax

authorities. At that time they secured the advantage of wiping out a major part of the liability of Sha Mulchand and Co., to Jawahar Mills, Ltd.

Having thus secured freedom from liability, Sundara Ayyar started within two days after O. P. No. 11 of 1942, was disposed of, the suit (O.S.

No. 32 of 1942) against Jawahar Mills, Ltd., and Palaniappa. At the time of the settlement of O. P. No. 11 of 1942 it must have been obvious to

Sundara Ayyar and Govindarajulu Chetty that there was a forfeiture of the shares and that Jawahar Mills, Ltd., must have entered into the

settlement on the assumption that the forfeiture was good and would not be questioned. No doubt there is no express stipulation in the settlement

to that effect but while Sundara Ayyar entertained the sinister idea in his mind of settling the claim in O. P. No. 10 and thereafter questioning the

forfeiture by a suit, Jawahar Mills, Ltd., were unaware of it and they must have then thought that the forfeiture would not be disputed, particularly

as they had already re-allotted the shares forfeited of which notice was also given to Sha-Mulchand and Company. It must: have been common

knowledge at that time that the shares were no longer available with Jawahar Mills, Ltd. In the suit, Sundara Ayyar was unsuccessful against

Jawahar Mills and the appeal also shared the same fate. He, however, prosecuted the claim against Palaniappa in the suit after remand on the

footing that the forfeiture was good and that he was entitled only to damages. It was during the pendency of the appeal in the High Court that he

thought of reviving the company by filing O. P. No. 199 of 1944 as he then found that the liabilities of the company were wiped out, that the

shares in Jawahar Mills, Ltd., were fast increasing in value and were paying high dividends. It is with this background that the conduct has to be

judged. The present proceedings are conducted only for the benefit of the two shareholders 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.

17. It will be seen therefore that the conduct of these two shareholders is analogous to the conduct of the plaintiffs in the cases referred to above.

They had no idea of reviving the company till 1944 and proceeded or acted on the footing that the forfeiture was valid. No doubt, the right to

avoid the forfeiture was in the company of Sha Mulchand and not in the shareholders. But it was open to the shareholders to bring into existence

the company if they intend to question the forfeiture and they must have been well aware of the position that 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 the 11th August, 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 of the

Companies Act, Jawahar Mills, Limited, 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 5,000 shares numbering 15,048 to 20,047. In view of these facts, if the applicants were Sundara Ayyar and

Govindarajulu Chetty, it would have been a case in which the relief should be refused in the light of the principles already adverted to.

18. Is the company affected by the conduct of its shareholders in view of the doctrine in Salomon's case¹ which refused to identify a company

with its controlling shareholders. The tendency of modern decisions in England is to lift the veil of corporate personality² 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 ³"Legal Theory by W. Friedmann at pages

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 (1939) 4 All E.L.R. 116 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. Tiruvenkatachari, 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 granted the relief now claimed.

Apart from this there is a more insuperable difficulty in granting the relief to the application. *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 the 11th August, 1944, in O.P. No. 84 of 1944. The shares therefore are not available in specie with *Jawahar*

Mills, Limited. The learned Judge saw this difficulty and stated in the judgment that it was agreed by both parties before difficulty and stated i the

judgment that it was agreed by both parties before him that in the circumstances it was impossible to make an order of rectification. (sic) 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 16,000 shares of Rs. 10 each unissued, the applicant

company could be recognised as a shareholder in respect of 5,000 out 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 5,000 of the unissued

Rs. 10 share 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

5,000 of the unissued shares of 16,000. 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.

20. The principles governing specific restitution of moveable property are contained in Sections 10 and 11 of the 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 of the Indian

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 when 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 Kopje Diamond Mines Ltd.* (1893) 1 Ch. 618.

21. 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 that such information was available on

record as the appellant filed documents furnishing the necessary Information, see *Ontario Jockey Club v. McBride* (1927) A.C. 916 and *Re*

Greater Britain Insurance Corporation Ltd. Ex parte *Brockdorff* 124 L.T. 194.

22. 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. 25,000 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.