

## APPELLATE CIVIL.

*Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and Mr. Justice Shah.*

1916.

September 7.

MANILAL BRIJLAL SHAH (ORIGINAL APPLICANT), APPELLANT *v.* THE GORDHAN SPINNING AND MANUFACTURING COMPANY, LIMITED (ORIGINAL OPPONENT); RESPONDENT.\*

*Indian Companies Act (VII of 1913), section 38—Purchase of shares at a Court sale—Rectification of register—Power of Court—Director's power to refuse to register a Court-purchaser as a share-holder—Court's power to interfere with the discretion—Appeal to the High Court—Practice.*

A purchaser of shares of a limited Company at a Court sale is not entitled as of right to have his name entered in the register of the Company as a share-holder. He is subject to the same rules on this point as a private purchaser is.

The proviso to section 38 of the Indian Companies Act, 1913, should not be confined to the last clause, but must be read as a general reservation imposed on all clauses of the section.

Having regard to the fact that under the proviso an appeal is allowed from the decision of an issue directed to be tried, it is necessary and desirable that there should be a clear direction as to the trial of an issue, so that there may be no obscurity on the point and no room for the argument that there was no issue directed to be tried and consequently no right of appeal.

FIRST appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad in miscellaneous Application No. 109 of 1915.

Application for rectification of register under the Indian Companies Act, 1913.

The shares in dispute were originally owned by one Dosabhai. In execution of a decree against him they were sold by the Court and purchased by Manilal the present applicant. A deed of transfer was executed by the Court in applicant's favour. The applicant, therefore, applied to the Company to register the shares in his name but the Board of Directors refused to do so.

\* First Appeal No. 178 of 1915.

The memorandum of association of the Company provided as follows:—

“(22) The Directors are at liberty without showing any cause to refuse to transfer any shares (to get them entered) in the name of other persons. The Company can refuse to enter the transfer of those shares in the register on which the Company have a right of lien.

“(23) The transferor and transferee—both these persons—shall sign the document for the transfer of any share. Until the name of the transferee is entered in the register, the transferor shall be considered as the owner of the share.”

The Directors' refusal to register was based on the allegations that the applicant had made various efforts to harass the Company; that he had brought a false suit against the Company.

The applicant applied to the District Court for an order on the Company directing to register the shares. The application was dismissed on the following grounds:—

The question is whether this Court has a discretion and if so, whether it should exercise it..... I have not been referred to any English case but a judgment of Mr. Justice Phear, 1 Indian Jurist, N. S., page 258 is put in. This certainly is an authority for the proposition that a Company has no option to refuse registration of a transfer executed by the Court in execution and the authority of that Judge is very respectable and he advances cogent reasons.

On the other hand the case was not altogether parallel; the Company being apparently one constituted under British law, registered in England, the proceeding being one of mandamus, and the Company not apparently advancing any special objections to the registration as here.

It seems to me that there are also cogent reasons why registration in an Indian Company should not be enforced on an unwilling Company, even if the transfer is done by order of the Court.

Share-holders of a limited Company are in a relationship resembling that of partners and the same reasons which induce a Court to decline forcing a partner on persons who are reluctant to accept him as such, apply very strongly in the case of a share-holder in a limited Company, particularly in the case of Indian Companies where the one man Company is so common and where the people are so often peculiarly devoted to faction and intrigue.

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Again if this principle were accepted nothing would be easier than for any person who wished to be a member of a Company to make the usual stipulations in the Articles of Association, giving discretion to the directors as to transfer, a dead letter by collusive decree and sale.

The next point is whether they have exercised this discretion duly, for even though a discretion be given yet the Court will control directors so that they may not unnecessarily or capriciously limit the negotiability or rather susceptibility to transfer of shares, which the law regards as desirable. But as regards this on the affidavits I think they did exercise their discretion wisely."

The applicant appealed to the High Court.

*The Advocate General with G. S. Rao, for the respondent:*—We have to urge a preliminary objection. We contend that no appeal lies against the order of the District Judge. Our contention is based on two grounds: (1) The proviso to section 38 of the Indian Companies Act, 1913, which allows an appeal applies only to clause (3) and not to the whole section. There being no question relating to title in the present case, the proviso will not apply and no appeal lies. (2) An appeal lies only when the Court has directed an issue to be tried. In this case no issue has been directed to be tried. The application is merely decided on affidavits. The essential condition on which the right of appeal is dependent not being satisfied no appeal is competent. The case of *Amrita Lal Ghose v. Shrish Chunder Chowdhry*<sup>(1)</sup> may apply to the first objection but not to the second. The appellant will have his remedy by way of suit.

*G. N. Thakor, for the appellant:*—I submit that an appeal is competent. As regards the first objection the case of *Amrita Lal Ghose v. Shrish Chunder Chowdhry*<sup>(1)</sup> is a direct authority in my favour. The proviso applies to the whole section. It now begins with a separate paragraph which clearly shows that it is a proviso to the whole section.

(1) (1899) 26 Cal. 944.

The above case is also an answer to the second objection. Even in that case it does not appear that an issue was directed to be tried. The case of *Sidhanath Dhonddev v. Ganesh Govind*<sup>(1)</sup> shows that an appeal may lie although no issue is specifically directed to be tried. In this case the learned Judge does not set out the question he is called upon to decide. Again the respondent puts in his reply to the application. Each side knew what the questions at issue were. Sufficient time was taken for putting in affidavits. If an issue was not formally raised, it is the fault of the Court. No party has been prejudiced by the omission.

The practice has been rather loose in this respect in the past. Appeals have been allowed under similar circumstances.

*The Advocate General* in reply.

*G. N. Thakor* :—I contend that the appellant being a purchaser at a Court-sale, the Directors have no right to refuse to register the appellant's name. The transferor not having signed the transfer the Court has executed the transfer for him. The Articles 22 and 23 of the Articles of Association of the Company which give the Directors a discretion to refuse registration do not apply to such a case. I base my contention in two-fold manner. (1) The Articles should be so construed as to restrict the power vested in the Directors to cases of voluntary transfer so as not to conflict with the law. (2) Assuming that they are not so construed they are *ultra vires* of the Company as they contravene the provisions of the law.

(1) The position of the Articles and their wording suggest that only voluntary transfers were in contemplation. The framers never had in contemplation the case of a Court-sale.

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(1) (1912) 37 Bom. 60.

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(2) The Articles clearly conflict with the law if otherwise construed: see Order XXI, Rule 79 of the Civil Procedure Code, 1908, which says how delivery is to be made in the case of a share. This procedure has been followed in this case. The transferor cannot receive dividend or transfer the share to anybody else. The Company too cannot make payment to any other person than the appellant. The result will be a dead lock. The Company will by refusing the transfer be able to appropriate the share or at least the dividends.

The appellant has also no remedy provided in the Code by which he can have the sale set aside. He, therefore, loses his moneys without being recognised as a share-holder. This could never have been contemplated.

A private purchaser will not have to pay up before he is registered. He has a beneficial interest in the same. He has his remedies against the transferor. The Court-purchaser has no such remedy. He cannot defer payment which must be made according to the directions of the Court.

The case of *Reg. v. The East Indian Railway Company*<sup>(a)</sup> is directly to the point. The case cannot in principle be distinguished from the present. The above case should therefore be followed. The result otherwise will be that shares in corporations cannot be the subject matter of sales under similar circumstances though the Civil Procedure Code expressly allows them to be attached, sold and delivered.

On the merits also I contend that the order is wrong.

The Advocate General objected to the appellants going into the merits. The merits of the case were accordingly not allowed to be gone into.

<sup>(a)</sup> (1886) 1 Ind. Jur. (N.S.) 258.

BATCHELOR, Ag. C. J. :—This is an appeal from a decision of the learned District Judge of Ahmedabad upon an application made under section 38 of the Indian Companies Act (VII of 1913). The only facts which it is necessary to state are these. The five shares in controversy were originally owned by one Dosabhai. A decree against him was obtained by one Balmukund, and in execution of that decree these five shares were sold by the Court. They were purchased by the present applicant. As the judgment-debtor Dosabhai was unwilling to execute the transfer deed in favour of the applicant, the deed was executed by the Court. In these circumstances the applicant claims that he is entitled as of right to have his name placed on the register. The Directors have refused to register the transfer, and the learned District Judge has decided against the applicant, who consequently brings the present appeal.

The learned Advocate General takes a preliminary point that under section 38 of the Act the appeal is not competent. The objection is put in two ways. First, it is said that the proviso, which occurs at the end of the section, must be confined to the third clause of the section. Mr. Jardine admits that upon this point we have to guide us nothing but the framing of the section and the setting in which the proviso is placed. It appears to me that these circumstances constitute too slight and uncertain a ground for the inference which is sought, and I am of opinion, following the decision in *Amrita Lal Ghose v. Shrish Chunder Chowdhry*,<sup>(1)</sup> that the proviso should not be confined to the last clause of the section, but must be read as a general reservation imposed on all the clauses.

Secondly, it was contended that the appeal does not lie because the conditions under which alone an appeal is

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granted under this section are not in this case satisfied. Now the conditions precedent to the existence of an appeal are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue. The Advocate General contends that no such issue was in this case directed to be tried, and consequently, that there is no decision of the kind from which alone an appeal under the proviso is sanctioned. Speaking for myself, I think that there is great force in this argument, and I am very doubtful whether strictly, and as of right, this appeal is competent. I think that the appeal is certainly not rendered competent merely by reason of the circumstance that there occurs in the lower Court's judgment a passage in which the learned Judge sets out the nature of the question before him, and that it is possible to regard that question as a question of law. It is clear that in every application made to the Court there must be some question or other for the Court's decision, and I cannot concede that when that question is capable of being regarded as a question of law, nothing more is needed for the admissibility of an appeal. On the contrary, I think, that if an appeal is to be admitted, there must be a specific issue of law directed by the Court to be raised, and directed with some advertence to the terms of this proviso. That has not been done in this case, and if the matter rested there, I should be inclined to say that the appeal did not lie. But it has been conceded before us that in the past the practice in these matters has been to this extent lax that wheresoever an Appellate Court could seem to discern a question of law in the judgment of the lower Court, an appeal has always been allowed, even though no specific issue had been directed to the point. In this state of circumstances, rather than allow the present appellant

to be prejudiced by the laxity of procedure in the past, I am prepared to admit the appeal and consider it on its merits.

Now on the merits the simple question involved is whether the appellant is entitled to claim that the Directors shall register his transfer, and is so entitled by reason of the fact that he is a purchaser at a Court-sale and not a private purchaser. For admittedly, if he were a private purchaser, he would not be entitled to throw any such obligation upon the Directors. It is urged that his position in this respect is substantially improved because he is a Court-purchaser. But after all the argument which we have heard from Mr. Thakor, I am unable to see in what respect his position is materially altered or improved by the circumstance that he purchased at a Court-sale. It may be that when the Directors refuse to approve a transfer after a Court-sale in execution, there may ensue inconveniences in practice. But similar inconveniences will also ensue when a private purchaser's transfer is refused to be accepted by the Directors acting within the limits of their discretion. For the purposes of this argument, we must of course assume that the Directors would be within their powers in refusing to register the present appellant, if he were a private purchaser, and not a Court-purchaser. Upon that assumption, I can see no reason why the Directors' powers should be curtailed merely because the appellant purchased at a Court-sale. For whether the sale is made by a private individual or by a Court, it seems to me clear that the thing sold and transferred from the seller to the buyer is merely the property in the share plus a limited, not an absolute, right to have the transfer registered. But the appellant here contends, and must contend, that when he purchased from the Court, he purchased, over and above the share, the absolute right of forcing the Directors to register his

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name. But that is a right which *ex hypothesi* the Court never had to sell. I infer that the appellant never bought it. This conclusion seems to me to be reinforced by the consideration to which the learned Judge has referred, the consideration, namely, that upon the case for the appellant nothing would be easier than to override that part of the memorandum of association which invests the Directors with a discretion to refuse to admit undesirable candidates. For if the appellant is right, then a person whose professed object might be to wreck or damage the Company could nevertheless oust the Directors' discretion, and compel them to register him, by the simple process of purchasing through the Court after a collusive decree. On these grounds, I am of opinion that notwithstanding that the appellant's purchase was made through the Court, the Directors' powers, under the memorandum of association, of refusing to accept the appellant as a shareholder, are unaffected. Upon this point the learned District Judge has held that the Directors were justified in their refusal, and all that is necessary now to say upon this part of the case is that on the facts found no question arises which could properly be urged under section 100 of the Civil Procedure Code. It is clear from those facts that the Directors would be justified in thinking, as they did think, that the appellant's object in obtruding himself upon this Company was to impede and hamper and embarrass the business of the Company, not to promote it. I think, therefore, that the appeal fails and should be dismissed with costs.

SHAH, J. :—I agree that the appeal should be dismissed with costs.

The preliminary objection raised by the learned Advocate General on behalf of the respondent that no appeal lies in this case is based on two grounds: first, that the proviso to section 38 of the Indian Companies

Act (VII of 1913) applies only to sub-section (3) and not to the whole section generally; and secondly, that the lower Court having omitted to direct an issue to be tried there can be no appeal.

As to the first ground I have no hesitation in coming to the conclusion that the proviso applies to the section generally and not only to the last sub-section. The corresponding proviso to section 58 of the Indian Companies Act of 1882 has been held to be applicable to the whole section in *Amrita Lal Ghose v. Shrish Chunder Chowdhry*<sup>(1)</sup>; and it seems to me that the position of the proviso with reference to the sub-sections in the new Act is all the more favourable to this construction. Besides, I am unable to appreciate the significance of this contention in this particular case, as under sub-section (3) the Court "generally may decide any question necessary or expedient to be decided for the rectification of register." It is not possible to suggest that the question decided by the lower Court was not necessary for the rectification of register.

The second ground is based upon the suggestion that in this case the Court has not directed any issue to be tried. It is apparently true that there is no such express direction. Having regard, however, to the procedure which is usually followed in applications under this section, it seems to me that though there was no express direction for the trial of the issue arising in this application, it was necessarily involved in the consideration of the application; and under the circumstances it is not unreasonable to hold that there was substantially a direction to try an issue raising the question set forth by the learned District Judge in his judgment, and that an appeal on the issue is competent. At the same time having regard to the fact that under

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the proviso as framed in the Indian Companies Act of 1915 the appeal is allowed from the decision of an issue directed to be tried, it is necessary and desirable that there should be a clear direction as to the trial of an issue, so that there may be no obscurity on the point, and no room for the argument that there was no issue directed to be tried and consequently no right of appeal. At the same time it is clear from the terms of the proviso that an appeal can lie from the decision of an issue directed to be tried on the grounds mentioned in section 100 of the Code of Civil Procedure.

The issue in this case raises two questions, one of law, and the other of fact. The question of law is whether the purchaser of certain shares of a limited company at a Court-sale in execution of a decree against the shareholder is entitled as of right to have the shares transferred by the company to his name. It is contended on behalf of the appellant that the company has no discretion in the matter, and has no power to refuse to transfer the shares to the name of the auction purchaser. It is common ground that a private purchaser from a shareholder must submit his application for transfer to the Company and the application is liable to be dealt with by the Directors as provided by Articles 22 and 23 of the Articles of Association of the company in question. But it is argued that the auction-purchaser in virtue of his purchase at a Court-sale has a much higher right in this respect than a private purchaser. On principle I am quite unable to see how the purchaser at a Court-sale can have any higher right. He purchases the property subject to the same limitations to which the original owner could sell privately. The intervention of the Court, and the compulsory character of the sale cannot prejudice the rights of the company and cannot alter the position of the purchaser in any way on this point.

There is nothing in the provisions of the Indian Companies Act and the Code of Civil Procedure to support the argument that the company is deprived of its usual powers, and relieved of its corresponding obligations, to deal with a transfer application, when the transfer is sought in virtue of a Court-sale. Mr. Thakor has relied upon Rule 79 of Order XXI of the Code of Civil Procedure in support of his argument. Under that Rule after the Court-sale, both the judgment-debtor and the company are prevented from transferring the shares and from receiving any dividend from, or paying it to, any person except the purchaser; and it is urged that if the company can be prevented from transferring the shares or paying the dividend to anybody except the purchaser, it must involve the result that the purchaser should be accepted as the transferee or else the company would be able to keep the benefit of the shares to itself. I do not think that the provisions of the Rule involve any such result. Even though under the Rule a company may be prevented from transferring the shares or paying the dividend to any person except the purchaser, it does not follow that the purchaser at a Court-sale is in any worse position than a private purchaser from a shareholder, whom the Directors have refused to accept as a proper transferee in the exercise of their powers under the Articles of Association. In considering this question we are not concerned with the inconveniences which would result to a particular individual from the Directors exercising their discretion against him. It is enough for the purposes of this appeal to point out that in this respect the position of a purchaser at a Court-sale is not worse than that of a private purchaser under the Rule, and that it cannot be made any better in virtue of the Rule.

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Mr. Thakor has relied upon *Reg. v. The East Indian Railway Company* <sup>(1)</sup> in support of his argument. But as I read that case the decision turns upon the facts and circumstances of that case, and it cannot be properly accepted as an authority for the broad proposition of law for which Mr. Thakor contends in this appeal.

I am, therefore, of opinion that the purchaser at a Court-sale is not entitled as of right to have his name entered in the register of the company as a shareholder. He is subject to the same rules on this point as a private purchaser undoubtedly is.

The second question raised in the issue is a question of fact, viz., whether on the facts stated the Directors have exercised their discretion properly in refusing to accept the present appellant as a transferee of the original shareholder. The learned District Judge has come to the conclusion that under the circumstances of this case the discretion of the Directors was "wisely" exercised. It is not necessary for me to express any opinion on this point; and I say nothing as to the merits or justice of the refusal by the Directors to transfer the shares to the present appellant. It is clear that the ground upon which the appeal is based is not covered by the grounds mentioned in section 100 of the Code of Civil Procedure.

*Decree confirmed.*

J. G. R.

(1) (1866) 1 Ind. Jur. (N.S.) 258.