Sri Gopal Jalan & Company

Vs

Calcutta Stock Exchange Association Ltd.

Civil Appeal No. 512 of 1961

(A. K. Sarkar, M. Hidayatullah, J. C. Shah JJ)

09.05.1963

JUDGMENT

SARKAR, J. –

The question in this appeal is, what is the meaning to be ascribed to the word "allotment" occurring in s. 75(1) of the Companies Act, 1956 ? That section requires a company to file a return of the allotment of its shares with the Registrar within a month of the making of the allotment. The appellant who has been accepted as a shareholder in the respondent Company for the purposes of the present proceedings, complained that the Company had not filed the return required by that section, and, therefore, moved the High Court at Calcutta under s. 614 of the Act for an order requiring it to do so.

The shares with which this case is concerned had been forfeited by the Company under its articles. A reference to some of these articles is necessary before we proceed further. Article 21 of the Articles of Association of the Company authorised its Committee to expel or suspend a member in certain events. The present is not a case involving an exercise of power under this article. Articles 22, 24 and 27 are in these terms :

> Article 22 : "Any member who has been declared a defaulter by reason of his failure to fulfil any engagement between himself and any other member or members and who fails to fulfil such engagement within six months from the date upon which he has been so declared defaulter shall at the expiration of such period of six calendar months automatically cease to be a member."
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> Article 24 : "Upon any member ceasing to be a member under the provisions of article 22 hereof and upon any resolution being passed by the Committee expelling any member under the provisions of Article 21 hereof or upon any member being adjudicated insolvent the share held by such member shall ipso facto be forfeited."
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> Article 27 : "Any share so forfeited shall be deemed to be the property of the Association, and the Committee shall sell, re-allot and otherwise dispose of the same in such manner to the best advantage for the satisfaction of all debts which may then be due and owing either to the Association or any of its members arising out of transactions or dealings in stocks and shares."

The appellant's contention is that the Company from time to time forfeited various shares under these articles and it appeared from its balance sheet that seventy of such forfeited shares had been

reissued at a nominal face value of Rs. 1,000/- but no return of such reissue of the forfeited shares had been filed by the Company. The Company in its affidavit in answer to the petition admitted these facts. Its was also said that these forfeited shares had been issued for much larger sums but nothing turns on that in this case.

Now s. 75, so far as material for our purposes, is as follows :

S. 75. (1) Whenever a Company having a share capital makes any allotment of its shares, the company shall, within one month thereafter, -

> (a) file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and occupations of the allottees, and the amount, if any, paid or due and payable on each share;
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> (5) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited for non-payment of calls.

The appellant contends that a return should have been filed of the re-issued forfeited shares under this section. The contention of the Company is that the re-issue of forfeited shares does not amount to allotment of shares and, therefore, it was not required to file any return in respect of such re-issued shares under the section. This contention was accepted by the learned Judge of the High Court before whom the appellant's petition was first moved and also by the learned Judges of the Division Bench of that Court on appeal from the decision of the learned trial Judge.

> We agree with the learned Judges of the High Court that a re-issue of a forfeited share is not an allotment of share within s. 75(1). The word "allotment" has not been defined in the Companies Act either in our country or in England. But we think that the meaning of that word is well understood and no decision has been brought to our notice to indicate that any doubt has ever been entertained as to it. As Chitty J. put it in In re Florence Land and Public Works Company [(1885) L.R. 29, Ch. D. 421] (p. 426). "What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares."

The process described by Chitty J. is very familiar in Company law. Under the Act, a company having share capital is required to state in its memorandum the amount of that capital and the division thereof into shares of a fixed amount : see s. 13(4). This is what is called the authorised capital of the Company. Then the Company proceeds to issue the shares depending on the condition

of the market. That only means inviting applications for these shares. When the applications are received, it accepts them and this is what is generally called allotment. No doubt there may be an allotment of shares without an application but no instance exists where that word is used to describe a transaction whereby one becomes a share-holder otherwise than by appropriation to him of a share out of the previously unappropriated share capital.

> So Farwell L.J. said in Mosely v. Koffyfontain Mines Limited [(1911) I.L.R. Ch. 73, 84]. "As regards the construction of these particular articles it is plain that the words 'creation', 'issue', and 'allotment' are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital; first, it is created; till it is created the capital does not exist at all. When it is created it may remain unissued for years, as indeed it was here; the market did not allow of a favorable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in Spitzel v. Chinese Corporation, 80 L.T. 347, 351, he says : 'What is an allotment of shares ? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person'." Lord Greene M.R. observed in In re V.G.M. Holdings, Limited, [(1942) 1 Ch. D. 235] "it seems to me that the word 'purchase' cannot with propriety be applied to the legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. He does not purchase anything when he does that. Mr. Wynn Parry endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription in the usual way. I am unable to a accept that view. A share is a chose in action. A chose in action implies the existence of some person entitled to the rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between creation and the transfer of a chose in action."

It is beyond doubt from the authorities to which we have earlier referred and there are many more which could be cited to show the same position, that in Company law 'allotment' means the appropriation out of the previously unappropriated capital of a company of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence. Learned counsel for the appellant has not been able to cite any case where the word "allotment" has been used to describe a transaction with regard to an existing share, that is, a share previously brought into existence by appropriation to a person out of the authorised capital. In every case the words 'allotment of shares' have been used to indicate the creation of shares by appropriation out of the unappropriated share capital to a particular person. We find no reason why the word 'allotment' in s. 75 should have a different sense. It is said that sub-s. (5) of s. 75 furnishes such a reason. We will deal with that argument later. Our attention has not been drawn in any other provision in our Companies Act which would support the contention that the Act includes within the word 'allotment' a transaction with a share after it has been first created by appropriation out of the authorised share capital to a particular individual. As the learned Judges of the High Court pointed out, s. 75 occurs in Part III of the Act which deals with "Prospectus And Allotment, And Other Matters Relating To Issue Of Shares Or Debentures". Section 69 to 75 are classed under the sub-heading 'Allotment' and the only kind of allotment that is dealt with in these

sections is the appropriation of shares to individuals out of the unappropriated share capital of the company. In these circumstances it would be impossible to give to the word 'allotment' in s. 75(1) a different meaning.

Now it is quite clear that when a share is forfeited and re-issued it is not allotment in the sense of appropriation of share out of the authorised and unappropriated capital so as to bring the shares into existence. In the present case both sides proceeded on the basis that the articles of the company dealing with forfeiture of shares which we have earlier set out are valid articles. In other words, it has not been disputed that the Company may validly forfeit shares in terms of these articles. We accept that basis and proceed on the assumption that it is correct. In the High Court at Calcutta there was a difference of opinion as to the validity of these articles but the later view is that the articles are valid. The reason for the view has thus been put in the latest case in the Calcutta High Court, namely, Calcutta Stock Exchange Association Ltd. v. S. N. Nundy and Company [[1950] 1 I.L.R. Cal. 235]. Harries C.J. dealing with the very articles with which we are concerned, observed at p. 264, "In the present case, the Articles relating to forfeiture do not, in my view, offend against the provisions of the Companies Act, as they do not contemplate a reduction of capital or a purchase of shares or a trafficking in shares". Now, obviously, if upon forfeiture, the shares had ceased to exist qua shares and become merged in the unissued capital of the Company, then there would leave been a reduction of the capital and such a forfeiture would have been invalid. The reason why it was held that the forfeiture was valid was that on such forfeiture all that happened was that the right of the particular shareholder disappeared but the share considered as a unit of issued capital continued to exist and was kept in suspense until another shareholder was found for it : see Naresh Chandra Sanyal v. Ramani Kanta Ray [[1945] 2 I.L.R. Cal. 105]. We have to examine the present case on this basis.

If, therefore, the shares which the Company forfeited have to be considered as shares already created and as continuing in existence as such in spite of the forfeiture, obviously they could not be allotted in the sense in which that word is understood in the Company law as we have earlier stated. In Morrison v. Trustees etc. Insurance Corporation [[1899] 68 L.J. Ch. 11], the articles of the Company gave power to forfiet shares for non-payment of calls and further provided that "any share to forfeited shall be deemed to be the property of the Company and the directors may sell, re-allot or otherwise dispose of the same in such manner as they think fit". It was held that the Company could re-issue the forfeited shares giving credit for the money already received in respect of them. The contention that the transaction amounted to the issue of a share at a discount was rejected. Vaughan Williams L.J. observed : "I do not like the use of the word 'issue' with reference to the transaction with regard to these shares. If they were being issued, the argument for the appellant might possibly be right; but they are not being issued. When we look at the articles we see that what takes place on a forfeiture of shares is that the power of transferring them passes from the original shareholders to the company and the company can then transfer the shares subject to the same rights and liabilities as if they had not been forfeited". To the same effect are the observations of Bacon V. C. in Ramwell's case [[1881] 50 L.J. Ch. (N.S. 827]. Quite clearly, the view well accepted in Company Courts has been that issue of the forfeited shares was not allotment of them but only a sale. If it were not so, the forfeiture itself would be invalid as involving an illegal reduction of capital. If the re-issue of a forfeited share is only its sale, then it is not an allotment and that being so, no question of filing any return in respect of such re-issue arises.

It remains now to deal with sub-s. (5) of s. 75. That does create a difficulty. It provides that no return need be filed in respect of allotment of shares forfeited for non-payment of calls. It gives rise to an argument that the Act contemplates an "allotment" of shares forfeited for non-payment of calls

for otherwise it would not be necessary to provide that returns in respect of such allotment need not be filed. It is said that that being so, the word "allotment" in s. 75(1) should be understood as including the issue of shares forfeited for other reasons, for there is no reason to make any distinction between shares forfeited for non-payment of calls and those forfeited for other reasons in the present context. This argument is no doubt legitimate. But having given it our best consideration, we have come to the conclusion that it should be rejected. We think that sub-s. (5) owes its origin to a confusion of ideas. Apart from it, all other provisions of the Act clearly contemplate by allotment the creation of shares out of the authorised and unappropriated capital of the Company and not re-issue of shares already created by allotment in the manner aforesaid but subsequently forfeited. There would be no justification for altering the meaning of that word in any other part of the Act because of the solitary provision occurring in sub-s. (5) of s. 75. The Companies Act in force before the Act of 1956 was the Act of 1913. Section 104(1) of that Act corresponded to s. 75(1) of the present Act. In 1936 there were large amendments made in the 1913 Act. Prior to these amendments there was no provision in s. 104 of the Act of 1913 corresponding to sub-s. (5) of s. 75 of the present Act. Therefore, upto 1936 there was no reason to contend that the word "allotment" in s. 104(1) could at all include the re-issue of a forfeited share. The 1936 amendment added sub-s. (4) to s. 104 and that sub-section contained provision similar to sub-s. (5) of s. 75 of the present Act. We do not think that it could be legitimately contended that by the amendment of 1936 the meaning of the word "allotment" in s. 104(1) was altered. That being so, the word "allotment" in s. 75(1) must be understood without reference to sub-s. (5) in the same way as that word in s. 104(1) had to be understood without reference to sub-s. (4) of that section. It is safer to read sub-s. (5) of s. 75 as having been enacted ex abundanti cautela, that is to say, to prevent any argument being raised that a return has to be filed of the re-issued shares forfeited for non-payment of calls. We also agree with the view expressed in the High Court that the reason why only forfeiture for non-payment of calls was mentioned in s. 104(4) of the Act of 1913 and s. 75(5) of the present Act is that there has always been a great deal of doubt as will appear from the difference of opinion in the Calcutta High Court to which we have earlier referred, as to whether there can be any forfeiture of shares except for non-payment of calls which latter case had been expressly provided for by the statute. The other cases of forfeiture had apparently not been mentioned because if they had been it could have been legitimately argued the legislature considered such forfeiture valid and the legislature did not want to give support to that argument.

We think for these reasons that the appeal fails and we dismiss it with costs.

Appeal dismissed.

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