

# CALCUTTA HIGH COURT

Mahadeo Lal Agarwala

Vs.

New Darjeeling Union Tea Co. Ltd

A.F.O.D. No. 94 of 1947

(G.N. Das and Surajit Chandra Lahiri, JJ.)

22.02.1951

## JUDGMENT

### **Surajit Chandra Lahiri, J.**

1. This appeal by the plaintiffs arises out of a suit for declaration of title of the plaintiffs' 7/8th share in respect of two hundred shares of the New Darjeeling Union Tea Co., Limited, (defendant no. 1) and for mutation of the plaintiffs' names in the share register of the said company, for recovery of the dividends and for a permanent injunction restraining the said company from paying any dividend to defendants Nos. 2 and 3.

2. The plaintiffs' case is that in Money Suit No. 33/31 the plaintiffs obtained a decree against one Kazi Md. Ismail and 9 others and in execution of that decree (which was Money Ex. Case No. 29/32) auction purchased 7/8th share of shares Nos. 4818 to 5017 of the defendant company on 28-6-32. Thereafter the plaintiffs obtained a share transfer deed executed by the Court in terms of Order 21, Rule 80, and wrote to the defendant no. 1 in 1940 asking for information as to what should be done to get their names mutated. As there was no reply to that letter the plaintiffs in 1941 complained to the Registrar Joint Stock Company who after enquiries informed the plaintiffs that the shares stood in the name of Rajani Kanta Mukherjee (deceased) who had obtained mutation on the basis of his auction purchase and private purchase of the said shares. In the plaint the plaintiffs alleged that in the execution case started, by them the judgment-debtors as well as the Secretary of the defendant no. 1 company were duly served with the prohibitory order under the C. P. Code. In spite of that the judgment-debtors sold their shares to the said Rajani Kanta Mukherjee by private treaty and Rajani Babu also auction-purchased the interest of Kazi Md. Ismail on or about the 25th July, 1936. As the said Rajani Kanta Mukherjee was an influential Director of the defendant no. 1, company, the company fraudulently, illegally and dishonestly entered the name of Rajani Kanta Mukherjee as the sole share-holder of the said 200 shares. Rajani Kanta Mukherjee having died his interest devolved upon defendants no. 2 and 3 as his heirs. The plaintiffs accordingly prayed for a declaration of their title in respect of 7/8th share out of shares nos. 4818 to 5017 of the defendant company and that the mutation of the names of defendants 2 and 3 and of their predecessors is illegal and fraudulent and that the plaintiffs are entitled to mutation of their names in the share register of defendant no. 1. The second prayer

made by the plaintiffs was for a cancellation of the said mutation and a direction upon defendant no. 1 to mutate the name of the plaintiffs in respect of the aforesaid shares in the snares register. The third prayer was for a decree for dividend wrongfully paid by defendant no. 1 to defendants 2 and 3 and their predecessor-in-interest from 1938 to 1943 after taking accounts. The fourth prayer was for a permanent injunction restraining the defendants from paying or taking the dividends in future.

3. The suit was contested by the defendants by three separate written statements. The defendant No. 1 pleaded that the Court of the Subordinate Judge had no jurisdiction to try the suit and the proper Court is the Court having jurisdiction under the Indian Companies Act, that the allegations of fraud and collusion between defendant no. 1 and Rajani Kanta Mookerjee were untrue; that the plaintiffs did not apply formally according to law for mutation of their names; that the defendant No. 1 mutated the name of Rajani Kanta Mookerjee in good faith without any knowledge of the auction-purchase of the plaintiffs, that the discretion of the directors in granting mutation to Rajani Kanta Mookerjee and refusing it to the plaintiffs should not be lightly interfered with. The defendants nos. 2 and 3 after traversing the material allegations in the plaint raised the plea that the plaintiffs' suit was barred by limitation and that the auction sale at which the plaintiffs purchased was a nullity inasmuch as some of the judgment-debtors died and their representatives were not brought on the record.

4. The learned Subordinate Judge who tried the suit dismissed it on two grounds. In the first place he held that one of the judgment-debtors named Isfaque died before the execution case no. 29/32 but no notice was served upon his heirs under Order 21 Rule 22 C.P. Code, and therefore the sale was void as it took place on 28-6-32, before the insertion of sub-rule (3) by the Calcutta High Court in 1933. In the second place he held that the suit was barred by limitation under Article 120 of the Indian Limitation Act, because according to him the right to sue accrued to the plaintiffs on the 24th April 1938, which is date on which the defendant no. 1 mutated the name of Rajani Kanta Mookerjee and the plaintiffs instituted the present suit on the 23rd October, 1944, i.e., more than six years from the accrual of the right to sue.

5. Mr. Banerjee appearing in support of the appeal has challenged the decision on both the points.

6. In the first place he has contended that the omission to serve the notice under Order 21, Rule 22 makes the sale voidable and not void and even if it is void, it is void to the extent of the share of Isfaque only and the learned Subordinate Judge was wrong in holding that the entire sale was a nullity. In the second place he has argued that the right to sue accrued to the plaintiffs only when there was a clear and unequivocal threat to their right by defendant no. 1 and that took place on 14-11-41 when in reply to the plaintiffs' pleader's letter for mutation the defendant no. 1 informed the plaintiffs that the shares in dispute stood in the name of R.K. Mukherjee.

7. With regard to the first point as to whether the omission to serve the notice under Order 21, Rule 22, C.P. Code upon the heirs of Isfaque rendered the sale void or voidable the decision of the Judicial Committee in '*Raghunath Das v. Sundar das*<sup>1</sup>', really concludes the matter. This question directly arose for decision in that case and the Judicial

<sup>1</sup> 41 Ind App 251

Committee ruled that the omission rendered the sale invalid. Mr. Banerjee attempted to distinguish the case of Raghunath Das (41 Ind App 251) by relying on the decision in '*Malkarjun*

*v. Narhari*<sup>2</sup>, but we are of the opinion that the facts of the present case are exactly similar to the case of Raghunath Das and the sale must be held to be void to the extent of the share of Isfaque if he died before Execution Case No. 29/32. The real difficulty that we have felt in deciding this point is that it was not specifically raised in the written statement and the evidence is conflicting. In para 16 of the written statement of defendant no. 3 it was alleged that though reported during the execution case that some of the judgment-debtors died their legal representatives not being brought on the record, the sale in respect of their shares is a nullity. This allegation is vague and it does not also specify whether any of the judgment-debtors died before or after the filing of the execution case No. 29/32. P. Chatuvvedi (P.W. 2), states in his examination in chief that Asfaque died after M. Execution Case No. 29/32 was started but in cross-examination says that he died about a month before.....the Execution case. Defendant no. 3 who examined himself as D.W. 3 states that Asfaque and Nurul Huda died before Money Execution No. 29/32 was filed; their legal representatives were not made parties and no notices were served. In this state of the evidence it is difficult for us to decide whether Isfaque died before or after the filing of Money Execution Case No. 29/32. If he died before the said Execution Case the omission to serve notices under Order 21, Rule 22 upon his heirs rendered the sale invalid to the extent of his share, but if he died after the filing of the execution case no notice under Order 21, Rule 22 would be necessary.

8. The second branch of Mr. Banerjee's argument on the first point is undoubtedly correct. If the provisions of Order 21, Rule 22 are attracted to the facts of this case they make the sale void only to the extent of the share of Isfaque and the learned Subordinate Judge was clearly wrong in holding that the entire sale was a nullity on account of the omission to serve the notices upon the heirs of Isfaque. This proposition is supported by the decision in '*Manindra Chandra v. Rahatannessa Bibi*'<sup>3</sup>, and the learned Advocates appear for the respondents do not challenge it.

9. Mr. Sen appearing for Respondent no. 3 has raised the point that under Section 28 of the Indian Companies Act read with Article 25 of the Articles of Association the plaintiffs are not entitled to mutation of their names. Section 28 of the Indian Companies Act lays down that the shares are transferable in manner provided by the Articles of the Company. Article 25 of the Articles of Association requires that a transferee can obtain mutation of his name only on the basis of a letter signed jointly by the transferor and the transferee. Ex. 1 which is the share transfer certificate executed by the Court under Order 21, Rule 30, C. P. Code, shows that it was not signed by the auction-purchasers but it only bears the signature of the presiding officer of the Court on behalf of the transferors. Mr. Sen accordingly argues that this document is not in conformity with Article 25 and is therefore not sufficient in law to entitle the plaintiffs to obtain mutation of their names. In the case of '*Mohideen v. Tinnevelly Mills Co.*'<sup>4</sup>, it was pointed out that the word 'transfer' is not appropriate to indicate a sale in invitum by the Court, but means transfer by the acts of a member while the word 'transmission' means transmission by devolution of law. Moreover, in the case of an auction sale it is impossible to expect that the judgment-debtors would join the auction-purchaser in sending a letter to the company as is required

<sup>2</sup> 27 Ind App 216

<sup>4</sup> AIR 1928 Mad 571

<sup>3</sup> 35 Cal WN 220

by Article 25 of the Articles of Association. For these reasons we hold that Article 25 is confined to private transfers of the shares of the company and does not apply to auction sales.

10. Ex. B which is the resolution of the company dated 28-4-38 allowing registration of the name of Rajani Kanta Mookerjee was evidently based upon the purchase of a share of the disputed shares at an auction sale by Rajani on the basis of Ex. F, dated 31-7-36 and private purchase of the remaining share by Ex. 1 and 1 (1) on 14-3-38. It appears that the purchases made by Rajani Kanta Mookerjee were made after the service of the prohibitory order in Execution Case No. 29/32 upon the judgment-debtors as well as upon the defendant company on 8-3-32. Accordingly Rajani Kanta Mookerjee acquired no title to the shares by his purchases all of which took place after the auction sale in favour of the plaintiffs. Mr. Sen has argued that the plaintiffs have lost the priority of title on account of the fact that their document of title is not in conformity with Article 25. As we have held that Article 25 does not apply to auction sales we must conclude that the plaintiffs have not lost priority of title. Mr. Sen relied upon the decisions of the Bombay High Court in the case of '*Manilal v. Gordan Spinning and Manufacturing Co. Ltd*<sup>5</sup>', and of the Madras High Court in the case of '*Naghabhusanam v. Ramachandra Rao*<sup>6</sup>', for the proposition that where the Article of Association require that both the transferor and transferee must join in making an application to the company for registration of the name of the transferee, that condition must be complied with even in the case of auction sales held by the Court. There is nothing in the Articles of Association of the first defendant forbidding a sale by Court of the shares held by a member and in the absence of any such prohibition we are inclined to think that a sale by Court of the shares held by a member has the effect of transferring the shares to the purchaser. We are fortified in this view by the decision of the Madras High Court in the case of '*Mohideen v. Tinnevelly Mills Co*<sup>7</sup>.' where both the decisions relied upon by Mr. Sen were considered. Mr. Satya Priya Ghose appearing for the first defendant relied upon the provisions of Section 34 (3) of the Indian Companies Act which provides that it shall not be lawful for the company to register a transfer of shares unless the instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company. The language of this section clearly shows that it applies only to transfers by acts of parties and does not apply to sales held by the Court.

11. Another point raised by the first defendant requires consideration. It is urged that the only Court having jurisdiction under the Indian Companies Act can rectify the register of members and reliance is placed upon Section 38, Indian Companies Act. Section 3, Indian Companies Act provides that the Court having jurisdiction under the Act is the High Court or the District Court under a notification of the Provincial Government. Section 3 (3) however lays down that nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court. The point about the want of jurisdiction of the Subordinate Judge in the present case, though raised in the written statement does not appear to have been pressed at the trial and no issue was framed on this point. In the case of '*Rames Chandra v. Jogini Mohan*<sup>8</sup>', it was held by this Court that the remedy of the transferee of a share is not limited to an application under Section 38 Indian Companies

<sup>5</sup>541 Bom 76

<sup>7</sup> AIR 1928 Mad 571

<sup>6</sup>45 Mad 537

<sup>8</sup>47 Cal 901

Act, but he has the right to bring a suit to get his name registered and where the case is a complicated one an action should be brought. This decision was followed by the Madras High Court in '*Mohiuddin's case*' (AIR 1928 Madras 571) to which we have already referred. For these reasons we hold that the suit was maintainable in the Court of the Subordinate Judge.

12. The question of limitation now requires consideration. It is admitted by the parties that

Article 120 Indian Limitation Act applies to the facts of the case. The learned Subordinate Judge has held that the starting point of limitation is the date on which the first defendant passes the resolution allowing mutation of the name of Rajani Kanta Mookerjee i.e., 28-3-38 and as the suit was instituted on 23-10-44 it was more than six years from the date on which the right to sue accrued and therefore it was barred by limitation. In the case of '*Bolo v. Koklan*<sup>9</sup>', it was held by the Privy Council that under Article 120 the right to sue accrues when there is a clear and unequivocal threat to the plaintiff's right by the defendant. The passing of the resolution on 28-8-38, cannot in our opinion be said to constitute a clear and unequivocal threat to the plaintiff's right in the present case in the absence of anything to show that the plaintiffs were aware of the resolution. The defendants have filed a certificate of posting Ex. F, dated 5-11-40 in support of their case that the fact of the mutation of Rajani Babu's name was communicated to the plaintiffs on that date. The copy of the letter which was sent under the certificate of posting is not, however, produced. Even assuming that the resolution was communicated on that date the suit is within six years. But the letter by which the first defendant communicated the fact of the mutation of Rajani Babu's name to the plaintiffs is Ex. 8 (a), dated 14-11-41 by which the first defendant definitely refused to register the plaintiff's name, and this letter, in our opinion, constituted a clear unequivocal threat to the plaintiff's right. We accordingly hold that the period of limitation began to run from 14-11-41 and as the suit was instituted within six years from that date it is not barred by limitation.

13. Mr. Abinash Chandra Ghose appearing for respondent no. 2 raised the point that plaintiffs did not take possession under Order 21, Rule 79 within three years from the date of sale and therefore under Section 28 Indian Limitation Act their right was extinguished. Section 28 provides that on the expiry of the period of limitation for instituting a suit for possession of any property his right to such property shall be extinguished. It is difficult to see how Section 28 can have any application to the facts of the present case, as we have already held that the plaintiff's suit for declaration of their title is not barred under Article 120 of the Indian Limitation Act. This point raised by Mr. Abinash Chandra Ghose must accordingly be overruled.

14. The extent of the plaintiff's share now requires consideration. In the Register of members kept by the first defendant the disputed shares stood in the name of eight persons and out of these eight members the plaintiffs did not obtain any decree against three and they did not execute the decree against one of the judgment-debtors, viz., Kazi Md. Ismail. Therefore the plaintiffs by their auction-purchase could not have acquired any title to more than 8 as share if the sale had been valid in respect of the interest of Isfaque. The plaintiff's claim for declaration of title to 7/8th share is therefore not maintainable. As we have already pointed in a previous part of our judgment the materials on the record are

<sup>9</sup>57 Ind App 325

not sufficient for the decision of the question whether Isfaque died before or after the filing of the Money Execution Case No. 29/32 and the Subordinate Judge has not also come to any definite finding on this point.

15. The appeal is accordingly allowed in part. The judgment and decree of the Court below are set aside and the case must be remanded to the trial Court for the determination of the question whether Isfaque died before or after the filing of the Money Execution Case No. 29 of 1932. If the Court comes to the conclusion that Isfaque died before that date the sale in respect of his share will be void and the plaintiffs will have a declaration of title to 3/8th share in respect of

shares Nos. 4818 to 5017 of the first defendant; but if the Court comes to the conclusion that Isfaque died after the filing of the Money Execution Case No. 29/32 the sale will be valid even in respect of Isfaque's share and the plaintiffs will get a declaration of title to the extent of 8 as share. Parties will be entitled to adduce further evidence on this point as to the date of Isfaque's death.

16. After the determination of the extent of the plaintiffs' share the Court will determine the amount of dividend declared by the first defendant between the years 1938 and 1943 and ascertain if the first defendant paid the dividend to the second and third defendants or their predecessor Rajani Kanta Mukerjee (deceased.) If it is found that the first defendant paid the dividends to the second and the third defendants or their predecessor the Court will make a decree against defendants Nos. 2 and 3 in respect of the proportionate share of the plaintiffs. If, however, it is found that the 1st defendant did not pay the dividend to the 2nd and the third defendants or their predecessor the Court will pass a decree for the proportionate share of the plaintiffs against the first defendant. On these points the Court will base its decisions upon the materials on the record and further evidence that may be adduced by the parties.

17. The appellants will be entitled to half the costs of this appeal, hearing fee being assessed at 10 gold mohurs.

**Das, J.**

18. I agree.

Appeal partly allowed.