

A MANNALAL KHETAN ETC. ETC.

v.

KEDAR NATH KHETAN & ORS. ETC.

November 25, 1976

B [A. N. RAY, C. J., M. H. BEG AND JASWANT SINGH, JJ.]

*Companies Act 1956—S. 108—Scope of—“Shall not register transfer of shares”—If mandatory or directory—Tests for deciding.*

C *Interpretation—Mandatory or directory—Tests for determining—Non-compliance not declared an offence—If provision could be called directory.*

Section 108 of the Companies Act, 1956 provides that a company shall not register transfer of shares unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee has been delivered to the company along with the share certificate.

D The appellants and the respondents were members of a family. The family held shares in a company, and in addition, the members were doing partnership business. To realise large sums of income tax dues from the firms and individual partners, the Income-tax Department issued notices to the company to pay to that department any amount due to the firm or its partners. A receiver appointed by the Collector took possession of the appellants' shares along with duly signed blank transfer deeds. Later shares belonging to the family in the company were attached under O. 21, r. 46, C.P.C. In the meantime the appellants in settlement of their accounts with the respondents agreed for transfer of certain shares to the respondents as soon as the transfer became permissible. At the instance of respondents 1 and 2, however, the company, by a resolution, transferred the appellants' shares to the respondents. The appellants gave notice to the respondents that the shares under attachment of the Income-tax Department had been sold by the Collector and that the transfers were illegal and void. The respondents contended that it was not a case of transfer but one of transmission.

F In a petition under s. 155 of the Companies Act the appellants contended that the transfer was in contravention of the mandatory provisions of s. 108 and that the shares had been attached by the Collector under O. 21, r. 46 C.P.C. A single Judge of the High Court held the transfer to be illegal and void. On appeal a Division Bench held that the provisions of s. 108 were directory and not mandatory and that the provisions of s. 64, C.P.C. and O. 21, r. 46 prevailed over the prohibitory order contained in Form 18 in Appendix E of Schedule I of the C.P.C., but that the attachment and appointment of Receiver, did not divest a party of his right to his property.

G Allowing the appeal,

HELD: The provisions of s. 108 of the Companies Act are mandatory and the High Court erred in holding that they were directory. [197B]

H (1)(a) The words “shall not register” are mandatory in character. The mandatory character is strengthened by the negative form of the language which is used to emphasise the insistence of compliance with the provisions of the Act. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative. (See *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga & Ors.* [1952] S.C.R. 889 at pp. 988-89; *M. Pentiah & ors. v. Muddala Veeramallappa & Ors.* [1961] 2 S.C.R. 295 at p. 308 and *Additional District Magistrate, Jabalpur v. Shivakant Shukla* [1976] Supp S.C.R. 172 followed. [195D-E])

(b) The tests for finding out when a provision is mandatory or directory are : the purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same subject and the language of the provision. Prohibition and negative words can rarely be directory. Negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory.

[195F-G]

*Raja Buland Sugar Co. Ltd. v. Municipal Board, Rampur* [1965] 1 S.C.R. 970 and *Seth Bikhraj Jaipuria v. Union of India* [1962] 2 S.C.R. 880 at pp. 893-94, followed.

(2) (a) In holding that s. 108 is directory and not mandatory for the reason that non-compliance with the section was not declared an offence, the High Court failed to consider the provisions of s. 629-A of the Act which prescribes a penalty where no specific penalty is provided in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether or merely to make the person who did it liable to pay the penalty. [196B]

(b) A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. If a contract is made to do a prohibited act, that contract will be unenforceable. If a contract is expressly or implied by prohibited by statute one has to see not what acts the statute prohibits but what contracts it prohibits. One is not concerned with the intent of the parties. [196C-E]

*St. John Shipping Corporation v. Joseph Rank* [1957] 1 Q.B. 267, referred to.

(c) The maxim *a pactis privatorum publico juri non derogatur* means that private agreement cannot alter the general law. What is done in contravention of the provisions of an Act of Legislature cannot be made the subject of action. [196F]

*Mellis v. Shirley L.B.* [1885] 16 Q.B.D. 446 referred to.

(d) In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful because it is not intended that a statute would inflict a penalty for a lawful act. [196G]

(e) If a penalty is imposed by statute for preventing something being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty imposed is not enforceable. [197A]

In the present case in addition to the prohibition issued under O. 21, r. 46, a separate prohibitory order was issued to the company in Form 18 in Appendix E of the First Schedule of the C.P.C. Therefore, the company by registering the transfer of shares was obviously permitting the transfer and such action being in violation of the prohibition is contrary to law. [197D]

(3) When the receiver held the scrips and the transfer forms, it was not open to the owners to exercise rights of ownership or to transfer their ownership to anyone else. [197F]

**CIVIL APPELLATE JURISDICTION :** Civil Appeal Nos. 1805 to 1808 of 1968.

Appeal from the Judgment and Decree dated the 24th May, 1963 of the Allahabad High Court in Special Appeals Nos. 108 to 111 of 1963.

*R. S. Gae*, (in CA. 1805/68) and *J. John*, for the Appellants in all the Appeals.

*Ex parte*, for Respondents in all the appeals.

**A** The Judgment of the Court was delivered by

RAY, C.J.—These four appeals by certificate raise two questions. First, whether the provisions of section 108 of the Companies Act, 1956 are mandatory in regard to transfer of shares. Second, can a company having been served with notice of attachment of shares register transfer of shares in contravention of the order of attachment.

**B** The appellant Mannalal Khetan and the respondents Kedar Nath Khetan and Durga Prasad Khetan are members belonging to two branches of the Khetan Family. The respondent Lakshmi Devi Sugar Mills Private Ltd. is a private company. It was incorporated on 7 April 1934 under the Indian Companies Act, 1913.

**C** The Khetan family held shares in the respondent company and in two other companies Maheshwari Khetan Sugar Mills Private Ltd. and Ishwari Khetan Sugar Mills Private Ltd. The shares stood in the names of (1) M/s. Ganeshnarayan Onkarmal Khetan, (2) M/s. Sagarmal Hariram Khetan, (3) Sri Mannalal Khetan and (4) Sri Radhakrishna Khetan.

**D** The members of the Khetan family did partnership business at various places. Civil Suit No. 337 of 1948 was filed in the Bombay High Court for dissolution of the partnership and for taking the accounts. On 3 July 1953 the Official Receiver of the Bombay High Court was appointed Receiver of the properties of the partnership firms.

**E** There were large income tax arrears and other tax liabilities outstanding against the firms and individual partners. For the realisation of the income tax dues the Income Tax Department issued in 1950 a notice under section 46(5)(a) of the Indian Income Tax Act, 1922 requiring the respondent company to pay any amount due to the firm of Ganesh Narayan Onkarmal or its partners to that department.

**F** On 16 June, 1953 a Receiver was appointed by the Collector of Bombay in execution of the tax recovery certificate issued by the Income Tax Officer S. VI Central Bombay. Subsequently under orders of the Bombay High Court the Receiver appointed by the Collector of Bombay took over papers of the dissolved firm from the Receiver appointed by the Bombay High Court. The Receiver appointed by the Collector of Bombay also took possession of shares standing in the names of M/s. Sagarmal Hariram Khetan, Sri Mannalal Khetan and Sri Radhakrishna Khetan along with blank transfer deeds signed by them.

**G** The Additional Collector of Bombay issued to the Collector of Deoria two certificates under which on 8 March 1954 and 18/31 October 1955 certain shares of the respondent company belonging to the Khetans were attached under Order 21 Rule 46 of the Code of Civil Procedure.

**H** On 31 July, 1957 the members of the Khetan family entered into agreement among them for exchange of blocks of shares held by them in the respondent company and other companies in settlement of their differences and disputes. These agreements provided for

transfer of shares in the respondent company and in the Maheshwari Khetan-Sugar Mills Private Ltd. belonging to Sagarinal Hariram and Ganesh Narayan Onkarnath groups to which the appellants belonged to the group of Kedarnath Khetan to which respondents 1 and 2 belonged. These transfers were in lieu of shares in Ishwari Khetan Sugar Mills Private Ltd. to be transferred by the group of respondents 1 and 2 to the group of the appellant. It is significant to notice that the agreements recited that the shares in the respondent company were under attachment of the Income Tax authorities, and, therefore, they could not be immediately transferred. The agreement was that as soon as the transfer of the shares became permissible or if the Income Tax authorities so permitted, transfers as agreed and contemplated would be effective.

On 8 April, 1958 and 3 October, 1959 the Board of Directors of the respondent company passed a resolution for transfer of the shares belonging to the appellant group to the group of respondents No. 1 and 2. These resolutions were passed on the applications made on behalf of respondents No. 1 and 2 and others of their group. The shares were thereafter entered in the respondent company's register in the names of respondents No. 1 and 2 and others of their group.

On 14 January, 1962 the appellant along with Kamla Prasad Khetan and Mataden Khetan gave notice to respondent No. 1 and Durga Prasad Khetan that the shares of the Ishwari Khetan Sugar Mills Private Ltd. which were under attachment of the Income Tax authorities had been sold by the Additional Collector of Bombay on 23 September, 1961. The notice stated that the agreements had become impossible of performance and the consideration of reciprocal promises disappeared. The notice further stated that the powers of attorney executed in favour of the respondent company by the appellant in respect of their shares in the Maheshwari Khetan Sugar Mills Private Ltd. and Laxmi Devi Sugar Mills Private Ltd. were revoked and cancelled. The notice concluded by saying that the respondents had no right, authority, or power to act on behalf of or in the name of the appellants in pursuance of the said power of attorney.

By another notice dated 14 January, 1962 the appellants informed the respondent company that the transfer of shares in the company's register had been made illegally and without authority because no proper instruments of transfer duly stamped and executed by and/or on behalf of the appellants were delivered to the respondent company and that the shares were under attachment by the Collector of Deoria for recovery of income tax arrears on the certificate issued by the Additional Collector of Bombay. The notice to the respondent company also said that certain shares in blank transfer forms were in possession of the Receiver appointed by the Additional Collector of Bombay in the income tax recovery proceedings. The notice concluded by stating that the respondent company was informed that the alleged transfer of shares from the names of the appellants as well as the deletion of their names from the register was illegal and void.

Respondent No. 1 and Durga Prasad Khetan contended in answer to the notice that the appellant had no right, title or interest in the

- A shares mentioned in the notice, that the shares had not been transferred but had been transmitted subject to the orders of the Income Tax authorities under section 46(5)(a) of the Income Tax Act, and that the shares of the Ishwari Khetan Sugar Mills Ltd. were sold by the Additional Collector of Bombay in recovery of the income tax arrears in spite of the protests lodged by the respondent and that the power of attorney in respect of the shares could not be cancelled by
- B the appellant. The respondents denied that the transfers were illegal and without authority.

- In this background the appellant on 17 July, 1962 filed a petition in the High Court of Allahabad under section 155 of the Companies Act 1956 referred to as the Act against the respondents. The appellant contended first that the transfers of all the shares in the respondent company's register were illegal because the transfers were without any proper instrument of transfer. The appellant also contended that the transfers were in contravention of the mandatory provisions of section 108 of the Act and articles of the respondent company. The second contention of the appellant was that no legal transfer of the shares in question should have been made because at the time of the alleged transfer the shares had been surrendered along with blank transfer forms to the Receiver appointed by the Collector of Bombay in execution proceedings for recovery of the income tax dues. The appellant also alleged that other shares had been attached by the Collector of Deoria in pursuance of the two certificates issued by the Collector of Bombay under Order 21 Rule 46 of the Code of Civil Procedure.
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- The learned Single Judge directed the respondent company to rectify the register of its members by removing the names of respondents No. 1 and 2 and to restore the names of the original share holders. The learned Single Judge rejected the contention of the respondents that it was a case of transmission of shares. The learned Judge said that the transmission of shares occurred only by operation of law and this was a case of transfer by voluntary act of the parties which could not amount to transmission. The learned Judge also held that although the transferees divested themselves of all powers and control in respect of the shares in question by executing irrevocable powers of attorney in favour of the transferees, mere transfer of control did not amount to transfer of possession. The learned Judge further held that the agreements to which reference has already been made were not instruments of transfer and the transfer of shares which were under attachment in pursuance of the certificate issued by the Additional Collector under Order 21 Rule 46 of the Code of Civil Procedure was illegal and void. The transfer of the shares which had been surrendered to the Receiver appointed by the Collector of Bombay was also held by the learned Judge to be bad on the same ground.
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- The respondents preferred an appeal. The Division Bench of the High Court set aside the order passed by the Company Judge and dismissed the applications of the appellant. The Division Bench held that the provisions contained in section 108 of the Act were directory and not mandatory. The Division Bench also held that the provisions of section 64 of the Code of Civil Procedure and Order 21 Rule 46
- H

prevailed over the prohibitory order contained in Form 18 in Appendix E of Schedule I of the Code. The Division Bench held that the appointment of the Receiver did not divest a party of his right to property and the mere fact that shares were handed over to the Receiver with blank instruments of transfer did not make any difference.

The provision contained in section 108 of the Act states that "a company shall not register a transfer of shares.....unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee..... has been delivered to the company along with the certificate relating to the shares or debentures ..... or if no such certificate is in existence along with the letter of allotment of the shares". There are two provisos to section 108 of the Act. We are not concerned with the first proviso in these appeals. The second proviso states that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law. The words "shall not register" are mandatory in character. The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasised by the negative language. Negative language is worded to emphasise the insistence of compliance with the provisions of the Act. (See *State of Bihar v. Maharajadhiraj Sir Kameshwar Singh of Darbhanga & Ors.*(<sup>1</sup>), *M. Pentiah & Ors. v. Muddala Veeramallappa & Ors.*(<sup>2</sup>) and *Additional District Magistrate, Jabalpur v. Shivakant Shukla*(<sup>3</sup>)). Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative.

In *Raza Buland Sugar Co. Ltd. v. Municipal Board Rampur*(<sup>4</sup>) this Court referred to various tests for finding out when a provision is mandatory or directory. The purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same subject and the language of the provision are all to be considered. Prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act. Therefore, negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (See *Maxwell on Interpretation of Statutes* 11th Ed. p. 362 seq.; *Crawford Statutory Construction, Interpretation of Laws* p. 523 and *Seth Bikhraj Jaipuria v. Union of India*(<sup>5</sup>)).

(1) [1952] S.C.R. 889, 988-89.

(3) [1976] Supp. S.C.R. 172.

(5) [1962] 2 S.C.R. 880, 893-94.

(2) [1961] 2 S.C.R. 295, 308.

(4) [1965] 1 S.C.R. 970.

- A** The High Court said that the provisions contained in section 108 of the Act are directory because non-compliance with section 108 of the Act is not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in section 108 of the Act the provision is to be considered as directory.
- B** The High Court failed to consider the provision contained in section 629(A) of the Act. Section 629(A) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or namely to make the person who did it liable to pay the penalty.

- C** Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See *Mellis v. Shirley*<sup>(1)</sup>). A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See *St. John Shipping Corporation v. Joseph Rank*<sup>(2)</sup>). See also Halsbury's Laws of England Third Edition Vol. 8, p. 141).
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- F** It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim *A pactis privatorum publico juri non derogatur* means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See *Mellis v. Shirley L.B.*) (Supra). What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action.

- G** If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

- H** Penalties are imposed by statute for two distinct purposes (1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources of

(1) L.R. (1885) 16 Q.B.D. 446.

(2) [1957] 1 Q.B. 267.

revenue either to the state or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty imposed is not enforceable.

The provisions contained in section 108 of the Act are for the reason indicated earlier mandatory. The High Court erred in holding that the provisions are directly.

Some of the shares were attached by the Collector of Deoria pursuant to two certificates issued by the Collector of Bombay. Other shares were surrendered along with blank transfer forms to the Receiver appointed by the Collector of Bombay in execution proceedings.

Order 21 Rule 46 of the Code of Civil Procedure lays down that in the case of shares in the capital of a corporation the attachment shall be made by a written order prohibiting in the case of the share, the person in whose name the share may be standing from transferring the same. In the present case, in addition to the prohibition issued under Order 21 Rule 46 a separate prohibitory order was issued to the company in Form No. 18 in Appendix E of the First Schedule of the Code of Civil Procedure. Therefore, the company by registering the transfer of shares was obviously permitting the transfer and such action on the part of the company being in violation of the prohibition is contrary to law.

Shares which had not been attached but had been surrendered to the Receiver appointed by the Collector of Bombay came from the possession of the Receiver in the partnership suit. The Receiver in the partnership suit took possession of the shares along with blank transfer forms in the year 1953. When the Receiver held the scrips and the transfer forms it was not open to the persons in whose names the shares originally stood to exercise rights of ownership in respect thereof or to transfer their ownership to anyone else.

For the foregoing reasons we set aside the decision of the High Court. The order of the learned Single Judge dated 5 March, 1963 is restored. There will be no order as to costs.

P.B.R.

*Appeal allowed.*