

Muniyamma and Others Vs. Arathi Cine Enterprises Pvt. Ltd. and Others

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Court : Karnataka

Decided On : Jan-07-1992

Reported in : [1993]77CompCas97(Kar); ILR1992KAR1262; 1992(2)KarLJ614

Judge : D.R. Vithal Rao and ;K.A. Swami, JJ.

Acts : [Companies Act, 1956](#) - Sections 108, 108(1), 111, 155, 155(2) and 156

Appeal No. : Original Side Appeal Nos. 16 and 19 of 1990

Appellant : Muniyamma and Others

Respondent : Arathi Cine Enterprises Pvt. Ltd. and Others

Advocate for Def. : Sri. Jayaram

Judgement :

K.A. Swamy, J.

1. These two appeals are preferred under section 4 of the Karnataka High Court Act, 1961, read with section 155(2) of the [Companies Act, 1956](#), against the common order dated October 8, 1990, passed in Company petition No. 62 of 1988 connected with Company Petition No. 48 of 1987. Of course, against the order rejecting Company Petition No. 48 of 1987, O.S.A. 17 of 1990 has been preferred by the petitioners therein, who are also the petitioners in Company Petition No. 62 of 1988. O.S.A. No. 17 of 1990 has also been posted for hearing along with O.S.A.

Nos. 16 of 1990 and 19 of 1990. The result of O.S.A. No. 17 of 1990 depends upon the decision in O.S.A. Nos. 16 and 19 of 1990. However, this order will not cover O.S.A. No. 17 of 1990 arising out of Company Petition No. 48 of 1987.

2. The petitioners in Company Petition No. 62 of 1988 are the appellants in O.S.A. No. 16 of 1990. O.S.A. No. 19 of 1990 is filed by respondent No. 2 in Company Petition No. 62 of 1988.

3. There are six respondents in O.S.A. No. 16 of 1990, whereas there are ten respondents in O.S.A. No. 19 of 1990. Respondents Nos. 1 to 6 in Company Petition No. 62 of 1988 are also respondents Nos. 1 to 6 in O.S.A. No. 16 of 1990. They are also respondents Nos. 1-appellant and respondents Nos. 3 to 6 in O.S.A. No. 19 of 1990. The petitioners in Company Petition No. 62 of 1988 who are the appellants in O.S.A. No. 16 of 1990 are respondents Nos. 2, 7, 8, 9, and 10 in O.S.A. No. 19 of 1990.

4. Company Petition No. 62 of 1988 was filed under section 155 of the [Companies Act, 1956](#) (hereinafter referred to as 'the Act'), for the following reliefs :

'Wherefore, it is prayed that this hon'ble court may be pleased to :

(i) order the rectification of the register of members of the first respondent-company and declare that the members of the company and their respective shareholding is as follows :

Sl. No.	Name of member	No. of shares held
1.	K. N. Sheshadri	260
2.	M. Venkatesh	50
3.	Pushpa Srinath (petitioner No. 3)	50
4.	Lakshmeeshappa (petitioner No. 4)	550
5.	Muniyamma (petitioner No. 1)	530
6.	Ashwathappa (petitioner No. 2)	250
7.	Dr. B. G. S. Murthy	2,100
8.	Mrs. B. G. S. Murthy	1,000
9.	Narayanamma (petitioner No. 5)	250
10.	R. Devaraj	250
11.	V. Ramachandra	300
12.	K. N. Shivaramkrishna	250
13.	K. S. Govind	250

(minor) 100 5,841 to 5,94014. K. S. Sunil (minor) 100 5,941 to 6,04015. K. S. Preethi (minor) 100 6,041 to 6,14016. V. Raghavan 270 6,141 to 6,41017. V. Nirmala 50 6,411 to 6,46018. V. Kalavathi 900 6,461 to 7,36019. Parvathamma 840 7,461 to 8,20020. Dr. G. N. Byraredddy 900 8,201 to 9,10021. V. Venu 900 9,101 to 10,000-----Total 10,000----- (ii) grant costs of these proceedings, and

(iii) pass such other or further orders as may be just and necessary on the facts and in the circumstances of the case.'

5. These reliefs were sought on the basis of several grounds enumerated in Company Petition No. 62 of 1988. We do not consider it necessary to repeat the same in our judgment as the same are summarised in the judgment of the learned company judge.

6. Respondents Nos. 3 to 6 in O.S.A. No. 16 of 1990 who were also respondents Nos. 3 to 6 in Company Petition No. 62 of 1988 resisted the petition on various grounds which have also been summarised by the learned company judge. Therefore, we do not consider it necessary to burden this judgment with the details of the same. Respondents Nos. 1 and 2 have not filed any objections to the petition.

7. On the basis of various pleas raised by the parties, evidence was recorded. Petitioners Nos. 1, 5, 4 and 2 entered the witness-box and gave evidence as PWs 1 to 4 respectively. Respondents Nos. 3 to 6 examined four witnesses as RWs 1 to 4. RW 1 was an officer of the Canara Bank, M. G. Road branch, Bangalore. RW 2 was the sub-manager of the Corporation Bank, Nrupathunga Road branch, Bangalore, RW 3 accountant in the Canara Bank, Avenue Road branch, Bangalore, and RW4 was executive assistant to K. L. Srihari, respondent No. 4 in Company Petition No. 62 of 1988 and O.S.A. No. 16 of 1990. The petitioners have marked seven documents out of the records produced by respondents Nos. 3 to 6 in Company Petition No. 48 of 1987. Exhibit P-1 is the share transfer form relating to Smt. Muniyamma (petitioner No. 1). Exhibit P-2 is the share transfer form of Narayanamma (petitioner No. 5), exhibit P-3 is the share transfer form of

Lakshmishappa (petitioner No. 4), exhibit P-4 is the proceedings of the meeting of the board of directors of the company held on February 24, 1986. Exhibit P-5 is the members' register. Exhibit P-7 is the share transfer form of Aswathappa (petitioner No. 2). Respondents Nos. 3 to 6 also have marked as many as 21 documents which have been marked as exhibits R-1 to R-21. A certain portion in exhibit R-1 is marked as exhibit R-1(a). Similarly, certain portions in exhibit R-2 are marked as exhibit R-2(a) and R-2(b). So also in exhibits R-3, R-12 and R-15, certain portions are marked as exhibit R-3(a), R-12(a) and R-12(b) and R-15(a), R-15(b) and R-15(c). Exhibit R-1 is the statement of current account up to November 17, 1989, relating to the first respondent-company. Exhibit R-1(a) is a certificate of extract dated November 7, 1989. Exhibit R-2 is the statement of account No. 1692 of respondent No. 2 for the period from December, 1985, to November 7, 1989. Portions marked therein as exhibit R-2(a) and R-2(b) relate to the certificate of extract dated November 7, 1989, and entries dated November 14, 1985, respectively. Exhibit R-3 is the statement of savings bank account No. 1749 of petitioner No. 4, Lakshmishappa, for the period from April, 1984, to December, 1987. A portion therein is marked as exhibit R-3(a) which is a certificate of extract. Exhibits R-4 to R-11 are the eight cheques dated November 9, 1989, issued by Universal Trading Company in the names of the petitioners as well as others. Exhibit R-12 is the statement of accounts relating to respondent No. 4, K. L. Srihari, up to November 30, 1989. The portions therein are marked as exhibit R-12(a) and R-12(b). Exhibit R-13 is another cheque dated February 24, 1986, issued in the name of Aswathappa (petitioner No. 2). Exhibit R-14 is also another cheque dated February 24, 1986, issued in the name of petitioner No. 1, Muniyamma. Exhibit R-15 is the statement of accounts of Universal Trading Co. for the periods from May, 1985, to April 12, 1986. Exhibit R-16, is the closing balance-sheet of account No. 001692 of Sri M. Venkatesh (respondent No. 2) maintained by the Corporation Bank. Exhibit R-17 is the transfer slip prepared by the Corporation Bank, transferring a sum of Rs. 2,58,000 to the S.B. Account No. 001692 of Sri M. Venkatesh, respondent No. 2 Exhibit R-18 is the certificate dated January 10, 1990, issued by the Corporation Bank certifying that the credit of Rs. 2,58,000 dated March 12, 1986, in the S.B. Account No. 1692 of Sri M. Venkatesh, comprising the amount of the cheque drawn on Canara Bank, Avenue Road

branch, Bangalore, and further giving the details of the cheque pertaining to four persons, viz., G. N. Byra Reddy, B. Venu, Dodda Muniyamma and Aswathappa. Out of them, the last two are petitioner No. 1 and petitioners No. 2 respectively. Exhibit R-19 is another certificate issued by the Corporation Bank, M. G. Road branch, Bangalore, certifying that the entries made in the clearing register are true. Those entries relate to a sum of Rs. 2,58,000 drawn by Sri M. Venkatesh from the Canara Bank, Avenue Road branch, Bangalore, on the cheque issued by him. Exhibit R-20 is the cheque dated March 12, 1986, issued by M. Venkatesh for a sum of Rs. 2,58,000 on the Corporation Bank, M. G. Road, Bangalore, on his S.B. Account No. 1692. Exhibit R-21 is the Company Petition No. 48 of 1987 filed by the petitioners in Company Petition No. 62 of 1988 for winding up of the first respondent-company.

8. The learned company judge first considered the scope of section 155 of the Act and held that the proceeding under section 155 was a summary proceeding and if a finding could be arrived at summarily, the exercise of power under section 155 would be quite proper and in such a case refusal of relief would be arbitrary; that the jurisdiction is discretionary; that equitable principles governed the exercise of jurisdiction; that if the conduct of the parties complained of was unfair and unjust in relation to the subject-matter of the litigation and the equity sued for would be very relevant for exercise of jurisdiction. The learned company judge derived the aforesaid propositions as stated by him from the decision of the Supreme Court in *Public Passenger Service Ltd. v. M. A. Khadar* : [1966]1SCR683 . The learned company judge was also of the view that the aforesaid propositions squarely applied to the case on hand. The learned company judge bearing these propositions in mind approached the case and held that the petitioners were none other than the persons belonging to the group of respondent No. 2 and that it was respondent No. 2 who was responsible for the transfer of the shares of the petitioners and collected the amount from respondents Nos. 3 to 6, and petitioner No. 4 received the amount of consideration for the transfer of his shares; that the petitioners were set up by respondent No. 2; that the petitioners had either deposed falsely or feigned ignorance of all material aspects of the events; that the petitioners failed to make out a prima facie case of the facts pleaded by them on the material issue; that Alwa was not examined and that similarly respondent No. 2

was not examined; that the burden was heavy upon the petitioners to prove that the official of the bank misused the confidence bestowed on him by the petitioners; that the petitioners and respondent No. 2 should not be allowed to take advantage of their own wrongs; that the evidence of M. A. Paul, RW 4, was not useful as to the material aspects of the transactions in question and his evidence was a poor substitute as a witness for respondents Nos. 3 and 4; that if the burden of establishing that the share transfer transactions had taken place was entirely on respondents Nos. 3 and 4, they would have failed to establish the same. The learned judge was of the view that the circumstances of the case tilted the balance in favour of respondents Nos. 3 and 4 as they had paid consideration for the share transfers and the petitioners had failed to establish that the share transfer forms were not executed by them; that failure of the second respondent to give evidence though he was present in the court on several dates proved that the present petition was a proxy fight between the second respondent and respondents Nos. 3 to 6. The learned company judge also came to the conclusion that even though exhibit R-21 showed the date as late as November 16, 1986, the petitioners were treated as shareholders; however, the learned company judge was of the view that even then the question that would arise was as to why the board purported to approve the alleged transfer of shares on February 24, 1986. Therefore, the learned company judge considered it safe to fall back on the ground that the jurisdiction was discretionary, summary and was also concerned with equities. He was also of the view that the share transfer forms were executed by the petitioners and were duly attested by the second respondent, consideration was paid by the transferees and it was collected by the second respondent on behalf of all the petitioners except the fourth petitioner; therefore, no injustice would be caused to the parties if the court declined to exercise the jurisdiction under section 155 of the Act. Accordingly, the learned company judge dismissed the petition keeping it open to the petitioners to establish their right, if any, by resorting to any other remedy.

9. The learned company judge also summarily referred to the oral evidence adduced by the parties and mainly relied on the evidence given by Lakshmishappa PW 3, and was of the view that the transfer forms were signed by petitioners Nos. 1, 2, 4 and 5. Regarding the other irregularities noticed by the learned judge, it

was held by him that all those need not be gone into when prima facie it was found that the petitioners have transferred the shares. Thus, the learned company judge dismissed the petition.

10. As a consequence of dismissing Company Petition No. 62 of 1988, Company Petition No. 48 of 1987 was also dismissed because the petitioners could not be treated as shareholders as they had, according to the learned judge, transferred their shares and thereby ceased to be members of the company.

11. We have been taken through the oral and documentary evidence and also the judgment of the learned company judge. In the light of contentions urged on both sides, the following points arise for consideration :

(1) Whether respondents Nos. 3 to 6 have proved that the petitioners sold and transferred their shares to them for valuable consideration

(2) Whether the transfer of shares of the petitioners was effected in accordance with law If not, whether it is valid in law

(3) Whether it is just and proper to go into the transfer of shares of other members of the company who are not before the court and grant rectification of the register of the members of the first respondent-company relating to those shareholders

(4) Whether the order under appeal is sustainable in law and on facts

(5) To what reliefs the petitioners/appellants are entitled

12. Point No. 1. - The petitioners and respondent No. 2 are related. Petitioner No. 1 is the mother of respondent No. 2. Petitioner No. 5 is the sister of Petitioner No. 1. Petitioner No. 4 is the brother of petitioners No. 1 and 5. Petitioners Nos. 2 and 3 are the relations of the other petitioners and respondent No. 2. Respondent No. 2 owned two bits of land bearing survey No. 68/4 measuring 14 guntas and S. No. 68/5 measuring 9 guntas situated in Nagasettyhalli. He got these lands converted for non-agricultural purposes with a view to put up a cinema theatre. One Sri K. N. Seshadri jointed the second respondent in the venture. The second respondent and K. N. Seshadri together got the first respondent-company incorporated under

the Act on November 30, 1978, with the authorised share capital of Rs. 10,00,000 divided into 10,000 shares of Rs. 100 each. Initially, 6,400 shares were allotted. Out of them, 530 shares were allotted to petitioner No. 1, 250 shares to petitioner No. 2, 50 shares to petitioner No. 3, 550 shares to petitioner No. 4 and 250 shares to petitioner No. 5. These allotments were made up to June 29, 1983. Thereafter, in the board meeting held on January 9, 1985, 50 shares were allotted to Smt. Nirmala. Again in the board meeting held on March 26, 1985, 3,540 shares were allotted to the following four persons :

1. Smt. Kalavathi . . . 900 shares
2. Smt. Parvathamma . . . 840 shares
3. Sri G. R. Byrareddy . . . 900 shares
4. P. Venu . . . 900 shares
Thus, by March 26, 1985, all the 10,000 shares were allotted.

13. The case of the petitioners is that no share certificates were issued at any time; that they did not sell or transfer their shares for consideration to any of the respondents Nos. 3 to 6; that petitioners Nos. 1 to 3 and 5 had not executed the share transfer forms; that the fourth petitioner signed the blank forms and handed over them to Sri P. K. Alwa, that none of the petitioners had received the consideration to transfer the shares; that the alleged transfer of shares was illegal as the share transfer forms were not accompanied by share certificates. The other plea raised by the petitioners need not be referred to at this stage. However it is necessary to point out that the alleged share transfer forms of Smt. Pushpa Srinath-petitioner No. 3 - were not produced and no explanation was offered by respondents Nos. 3 to 6 for non-production of the same.

14. According to the case of respondents Nos. 3 to 6, respondent No. 2 and one K. N. Seshadri formed leaders of two groups in the company and they were the major shareholders, K. N. Seshadri sold the shares relating to his group; that similarly respondent No. 2 sold the shares relating to his group which included the shares held by the petitioners; that the second respondent received the consideration for the transfer of the shares of the petitioners; that the consideration amount pertaining to the shares held by each of the petitioners except petitioner No. 4 was paid to respondent No. 2 through bearer cheques issued in the name of each of the petitioners; that the consideration amount payable to Lakshmishappa

(petitioner No. 4) for the transfer of his shares was paid to him through an account payee cheque; that respondent No. 2 had encashed all the other cheques and got the entire amount credited to his account and had withdrawn the same; that if there were any defects in the register of shareholders of the company and in the transfer forms, respondents Nos. 3 to 6 were not responsible; that it was the petitioners and respondent No. 2 who held all the records of the company till their shares were transferred to respondents Nos. 3 to 6 and till respondents Nos. 3 to 6 were appointed as directors in the meeting held on February 24, 1986. Therefore, it was the defence of respondents Nos. 3 to 6 that the petitioners were not entitled to take advantage of their own faults; that the case involved complicated questions as to title to the shares; therefore, in a summary proceeding under section 155 of the Act the same could not be gone into; that the petitioners were proxy fighters for respondent No. 2; that they had been set up by respondent No. 2; that the fact that the petitioners were illiterate did not, in any way, exonerate them from the liability arising out of the execution of the transfer forms; that the case of the petitioners that P. K. Alwa manipulated and got up alleged proceedings by misusing the transfer forms obtained by the second respondent for the purpose of obtaining loan was false and incredible, etc.

15. The evidence discloses that transfer forms pertaining to petitioners Nos. 1, 2, 4 and 5 were not fully filled up. They were also not duly stamped as required by section 108 of the Act. No doubt, Lakshmishappa admitted in his evidence that he had signed the transfer forms; but he claimed that the blank transfer forms were signed for the purpose of giving to Mr. Alwa and Venkatesh respondent No. 2 gave the same to Mr. P. K. Alwa. Lakshmishappa further stated that he did not receive any consideration; that Muniyamma, Narayanamma, Aswathappa and Pushpa Srinath, petitioners Nos. 1, 5, 2 and 3, respectively, signed share transfer forms and gave them to Venkatesh just as he gave exhibit P-3 to Venkatesh. Exhibit P-1 was the transfer form relating to Muniyamma who was examined as PW 1. She denied that she had executed the transfer form. The learned company judge had made a note that when she was confronted with transfer form for the purpose of asking her the question as to whether she had affixed her thumb impression, she refused even to look at the transfer form and denied that she had ever affixed her thumb impression for transfer of shares. In the cross-examination of PW 1, it was

elicited that she did not know anything about the first respondent-company. However, in the cross-examination, exhibit P-1 was confronted to her and she specifically stated that she had not seen exhibit P-1 before and exhibit P-1(a) was not made by her. Therefore, the observation that she refused to look at exhibit P-1 during the course of examination-in-chief is not of any consequence inasmuch as in the cross-examination she specifically stated that exhibit P-1(a) was not made by her. No step was taken by respondents Nos. 3 to 6 to prove that exhibit P-1(a) was made by PW 1.

16. Exhibit P-2 was a share transfer form relating to Narayanamma, petitioner No. 5, who was examined as PW 2. According to her evidence, she did not know how to sign her name. She further stated that she had not given any papers. She had not sold her shares of the first respondent-company. She also further stated that she did not know anything about exhibit P-2; that the company did not give her any return in lieu of her investment in the shares. In the cross-examination, it was elicited from her that she did not know 'what a company director is or means'. She also further stated that she did not know whether Lakshmishappa had any responsibility in the company besides being a shareholder. She denied the suggestion that exhibit P-2(a) was her signature. She specifically denied that she signed exhibit P-2 and exhibit P-2(a) was her signature. It was also elicited from her in the cross-examination that it was about 8 or 9 years since she had made investment in the first respondent-company and she had no income from the investment; that she did not know whether Lakshmishappa was the chairman of the first respondent-company and as to who was running the affairs of the company. P.W-3, as already pointed out, is Lakshmishappa. He admitted that he had signed the transfer form, exhibit P-3. He, however, denied the suggestion that the shares were transferred and the transfer was recorded in exhibit P-4 at page 45. It was also further elicited in the cross-examination that exhibit P-3 was given to P. K. Alwa to raise loan from the bank. Similarly, Muniyamma and others also gave transfer forms for the purpose of raising a loan from the bank. It was further elicited in his cross-examination that he did not have any personal account in any bank; that he did not know if he had a personal account in the Corporation Bank; that he was not an income-tax assessee. It was also further elicited that he did not know respondents Nos. 3 to 6 and whether they belonged to the Khoday's group;

that he did not know anything about Universal Trading Company. Of course, he went to the extent of stating that he did not know what he should do if a cheque were to be issued in his favour by anyone. He also denied that he received a cheque for Rs. 1,58,000 from Universal Trading Co. on February 24, 1986. He denied that exhibit P-6(a) was his signature. It is very relevant to notice that the transfer forms of other petitioners were not confronted to him. The signature and the thumb impression, as the case may be, of the other petitioners on the transfer forms were not identified by him as they were not confronted to him except eliciting in the cross-examination thus :

'Exhibit P-3 was given to Venkatesh and he gave it to P. K. Alwa as stated by me earlier, Muniyamma, Narayanamma and Aswathappa and Pushpa Sreenath signed share transfer forms and gave it to Venkatesh just as I gave exhibit P-3.'

17. On the basis of his evidence, the learned company judge has held that execution of transfer forms by the petitioners has been proved.

18. PW 4 is Aswathappa. He is petitioner No. 2. He stated that he did not know respondents Nos. 3 to 6; that he had not signed exhibit P-7 and P-7(a) was not his signature. Exhibit P-7 was the transfer form relating to transfer of 250 shares of this witness of respondents Nos. 3 to 6. At this stage, we may point out that 530 shares held by the first petitioner, according to the case of respondents Nos. 3 to 6, were transferred to respondent No. 5 and 250 shares held by the second petitioner were transferred to respondent No. 6, 50 shares held by the third petitioner were transferred to respondent No. 5 and 550 shares held by the fourth petitioner were transferred to respondent No. 5; and 250 shares held by petitioner No. 5 were transferred to respondent No. 3. Thus all the shares held by the petitioners were transferred to respondents Nos. 3, 5 and 6 as stated above.

19. Respondents Nos. 3 to 6 examined 4 witnesses. RW 1 was an official of the Corporation Bank, M. G. Road, Bangalore. He produced the S.B. account extract of Venkatesh and Lakshmishappa and the current account extract of Arathi Cine Enterprises which were marked as exhibits R-2, R-3 and R-1 respectively. Accordingly to his evidence, exhibit R-2 was the account extract of the S.B. Account No. 1692 of Venkatesh (respondent No. 2) for the period from December,

1985, to December, 1987. Exhibit R-3 was the account extract of the S.B. Account No. 1749 of Lakshmishappa from April, 1984, to December, 1987. He also spoke regarding the current account No. 326 of exhibit R-1 of Arathi Cine Enterprises for the period from September, 1984, to December, 1985. He admitted that the first petitioner did not have any account with the Corporation Bank, M. G. Road branch, Bangalore. Similarly, petitioner No. 2 also did not have any account with the Corporation Bank, M. G. Road, Bangalore. Respondent No. 2 had an account with the said bank. Of course, he was not able to state as to whose account the cheque, exhibit R-13 and R-14, were credited. He, however, stated that the cheque, exhibit R-15, was that of one Venkatesh and the same was prepared by the bank. He also spoke regarding the drawing of the amount of Rs. 2,58,000 by Sri Venkatesh-respondent No. 2. He further stated that the cheque was encashed and payment was made across the counter and as per the endorsement, the cash must have been paid to him. He identified Venkatesh who was sitting in the court when his evidence was recorded.

20. RW 2 was the sub-manager of the Corporation Bank, Nrupathunga Road branch, Bangalore. He produced eight cheques drawn, three in favour of B. G. S. Murthy, one each in favour of Lakshmishappa, Kalavathi and Pushpa Srinath, Narayanamma and Nirmala. He also stated that he did not know any of the drawees of the cheques to whom he referred in his examination-in-chief. He also further admitted that payees' signatures were not obtained on the cheques, exhibits R-4 to R-9; and so also on exhibits R-1 and R-11 and exhibits R-10 and R-11 being payees cheques, somebody who had taken the money had signed the cheques but he did not know who that person was. He also further stated that he did not know any of the persons in whose favour the cheques were drawn and were ultimately realised.

21. RW 3 was the accountant in the Canara Bank, Avenue Road branch, Bangalore. He produced the current account extract of Sri K. L. Srihari, respondent No. 4, for the period from January 1, 1986, to April 18, 1986. It was marked as exhibit R-12. Accordingly to his evidence, Sri K. L. Srihari issued a cheque dated February 24, 1986, in favour of Aswathappa for a sum of Rs. 25,000. That cheque was produced and marked as exhibit R-14. The amount

under the cheque was realised through Corporation Bank, M. G. Road, Bangalore, by the drawee-Aswathappa. He also further deposed that respondent No. 3 issued a cheque in favour of Dodda Muniyamma for a sum of Rs. 53,000 on February 24, 1986, which was also encashed through Corporation Bank, M. G. Road branch, Bangalore, by the drawee. The said cheque was marked as exhibit R-14. He spoke regarding the entries made in exhibit R-12 pertaining to the payment made under the aforesaid cheques. The entries were marked as exhibit R-12(a) and (b). In the cross-examination, he admitted that he did not know Aswathappa, Dodda Muniyamma and the petitioners in the case. He did not know if any of the petitioners had an account in the Corporation Bank, M. G. Road, Bangalore.

22. RW 4 was one M. A. Paul. He was an executive assistant to respondent No. 3. He claimed that he was acquainted with the transactions which were the subject-matter of the petition. He deposed on behalf of respondents Nos. 3 and 4. Through him Company Petition No. 48 of 1987 was marked as exhibit R-21. He stated that the second respondent, Venkatesh, approached respondents Nos. 3 and 4 and offered to sell the shares representing a group of shareholders who were the present petitioners. That another group of Seshadri also offered to sell the shares. The entire shareholding of the first respondent-company was held by these groups. He deposed that initially respondent No. 2 came up with the proposal for transfer of shares belonging to his group, subsequently Seshadri came forward with the offer to sell the shares of his group. There was certain litigation between the two groups as is revealed from Company Petition No. 48 of 1987; that prior to the acquisition of shares by respondents Nos. 3 and 4, the first respondent-company had borrowed from the Corporation Bank, M. G. Road branch, to the tune of Rs. 21,00,000 for the purpose of constructing the theatre; that 30 per cent. was spent for the said purpose. After the acquisition of shares, no further loan was obtained from the bank; the shares were not pledged with the bank; that the second respondent was behind the petitioners and it was he who was pursuing the matter. He also further stated thus :

'... He is sitting in the court today and he has been attending the court on all the days whenever this petition is posted. Venkatesh was acting on behalf of the petitioners in the matter of dealing with shares. Venkatesh was the managing

director of the company at the time he purchased the shares and he handed over the books of the company to us. All those books were maintained by the company by the previous management.'

23. In the cross-examination he stated that he did not know when Venkatesh approached Srihari and Swamy and offered to sell the shares; that he was not present when Venkatesh approached Srihari. He further stated that he was not personally aware of the particulars of the shares offered by Venkatesh to Srihari when he approached the latter; that he was not aware as to what happened during the meetings between Venkatesh and Srihari. He also further stated that he had not come across any authority given to Venkatesh by the petitioners to act on their behalf. He further admitted that the names found in annexure-A to exhibit R. 21(a) were the names of the then shareholders as on the date of the said agreement. He further stated that he was not aware of the procedure for the acquisition of shares. It may be noticed at this stage that exhibit R-21 is dated November 16, 1986.

24. The other evidence relating to transfer of shares is the minutes of the board meeting held on February 24, 1986, which is marked as exhibit P-4. This is all the evidence having a bearing on the transfer of shares held by the petitioners. The learned company judge has rejected the evidence of the petitioners solely on the ground that they belong to the group of Venkatesh and they are set up by Venkatesh and as such they should not be permitted to take undue advantage of their own acts. We are of the view that the burden was upon respondents Nos. 3 to 6 to prove that the petitioners transferred the shares for valid consideration and the transfer of shares was effected in accordance with law. The learned company judge has proceeded on the basis that it was for the petitioners to prove that there was no transfer of shares held by him. This is clear from the reasoning contained in paras 3 and 4 of the order of the learned judge under the heading 'Reconsideration for the transfers'.

25. The learned judge also expressed thus :

'If the burden of establishing that share transfer transactions had taken place was entirely on respondents Nos. 3 and 4, these respondents would have failed.'

26. The learned judge was of the view that respondent No. 2 was a group-leader of the petitioners and he was a relation of them and, therefore, he ought to have been examined in the case and his failure to enter the witness-box must lead to an adverse inference against the petitioners. We may at once point out that when the burden was upon respondents Nos. 3 to 6 to prove that there was a transfer of shares held by the petitioners and it was their case also that respondent No. 2 was responsible for transfer of the shares and it was he who received the cheques and encashed the entire amount except that of Lakshmishappa, it was all the more necessary for them to examine respondent No. 2 or at least request the court to direct respondent No. 2 to make himself available for cross-examination. According to respondents Nos. 3 to 6 the second respondent effected the transfer of shares and subsequently set up the petitioners and made them to carry on proxy fight. It has escaped the attention of the learned company judge that the burden of proving that the shares were transferred in accordance with law was upon respondents Nos. 3 to 6 and not upon the petitioners to prove the transfer of shares. It is the party who asserts the existence of certain facts or wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, the burden of proof of the existence of that fact lies on the person who asserts it. Respondents Nos. 3 to 6 have set up a plea that the shares held by the petitioners in the first respondent-company were transferred to them with the mediation of respondent No. 2. Therefore, the burden was upon respondents Nos. 3 to 6 to prove the alleged transfer of shares. Therefore, it is not possible to agree with the learned company judge for drawing an adverse inference against the petitioners for non-examination of respondent No. 2 especially when it was the case of the petitioners that they had not effected transfer of shares and had not received any consideration amount. Mere relationship of respondent No. 2 with the petitioners is not sufficient to draw an adverse inference against them.

27. On considering the evidence on record, we are of the view that it is not possible to hold that the transfer of the shares held by petitioners Nos. 1 to 3 and 5 is proved in the case. We will consider the case of the fourth petitioner separately. As already pointed out, none of the petitioners Nos. 1 to 3 and 5 has admitted that he or she has executed the share transfer forms. The transfer form pertaining to

petitioner No. 3 has not been produced. No explanation is offered for non-production of the same. Therefore, the case of respondents Nos. 3 to 6 that petitioner No. 3 has transferred her shares to respondent No. 5 is not proved, because no such transfer form is produced. As far as the other petitioners Nos. 1, 2 and 5 are concerned, in their evidence, it has been asserted by them that they did not transfer the shares. PW 1 was confronted with the transfer form exhibit P-1. Though initially she refused to look at it, but subsequently as already pointed out, she specifically stated in the cross-examination thus :

'I have never seen exhibit P-1 before. Exhibit P-1(a) is not made by me.'

28. PW 2 has specifically stated thus :

'I see exhibit P-2. I do not know anything about it. I do not know how to sign my name'.

29. She has also further stated that she has not sold her shares in the first respondent-company. Thus, it is the case of the fifth petitioner that she does not know how to sign, whereas the transfer form contains her signature. Under these circumstances, respondents Nos. 3 to 6 in order to prove that petitioners Nos. 1 to 3 and 5 have executed transfer forms have placed reliance on the evidence of the fourth petitioner, Lakshmishappa, who has stated that similarly petitioners Nos. 1 to 3 and 5 signed share transfer forms and gave them to Venkatesh just as he gave exhibit P-3. It is relevant to notice that Lakshmishappa was not confronted with the transfer forms alleged to have been executed by petitioner No. 1, petitioner No. 2 and petitioner No. 5. He has not identified the signatures and the thumb mark found on exhibits P-2, P-7 and P-1 as those of the alleged executants. There is no specific evidence on record to prove that exhibits P-1, P-2 and P-7 were executed by petitioners Nos. 1, 5 and 2 respectively. In the case of denial of execution of a document, the party who pleads the execution of a document shall have to prove by specific evidence as to the execution of the document, the signature of the executant has to be proved.

30. In the instant case, except the general statement of PW 3, Lakshmishappa, without referring to the documents, exhibits P-1, P-2 and P-7, there is no other

evidence. Not only this, the evidence on record also indicates that consideration amount had not been received by any one of petitioners Nos. 1 to 3 and 5. RW 4, Paul, has no personal knowledge about the meeting of respondent No. 2 with respondent No. 3. He has also not deposed that the amount received by RW 2 was paid over to petitioners Nos. 1 to 3 and 5. A person purchasing the shares or for that matter any property, is under an obligation to pay the consideration agreed upon for the transfer. This circumstance also goes in favour of the petitioners, whose case is that they have not transferred the shares in question. The learned company judge has also held that the case of the petitioners that the share certificates were not issued is not correct. Whereas, it is not disputed by the respondents that no share certificates were issued. The presence of the share certificates for transfer of shares is necessary. This circumstance also goes in favour of the petitioners that there was no transfer of shares and the forms signed by them were handed over to respondent No. 2, for the purpose of raising the loans. The learned company judge has rejected the evidence of PWs 1, 2 and 4, on the ground that they are not aware of the affairs of the company, being the shareholders. It is not possible to draw an inference from the circumstance that a shareholder is not aware of the affairs of the company, that he is not telling the truth before the court. It is a common knowledge that shares are purchased for the purpose of investment and it is not necessary that every shareholder must know the affairs of the company in detail unless it is one of the closely held companies. Therefore, we find it difficult to agree with the view expressed by the learned company judge, on the evidence on record. Learned counsel appearing for respondents Nos. 3 to 6 contended that these petitioners are set up by respondent No. 2, who has received the consideration and respondents Nos. 3 to 6 are the innocent purchasers of the shares and they had been persuaded to purchase the shares, as such the petitioners case should not be accepted and they should be held responsible for the acts of the second respondent in not paying the consideration amount to the petitioners.

31. It is contended that the second respondent approached respondents Nos. 3 to 6 as a leader of his group which included the petitioners and gave the transfer forms to respondents Nos. 3 to 6 who paid the consideration amount through cheques, which were encashed by the second respondent. As such, the case of

respondents Nos. 3 to 6 is that the second respondent is trying to come back into the company, after having sold all his shares and lost his interest in the company, through the petitioners. Here, we would like to point out that merely because the second respondent is related to the petitioners and he represented to respondents Nos. 3 to 6 that he was the leader of the group which included the petitioners, the responsibility of respondents Nos. 3 to 6 was not over by merely paying the amount into the hands of respondent No. 2. They were purchasing the shares of the petitioners. Therefore, they were required to see that the petitioners were consenting parties to the transfer and received the consideration amount. The evidence of RW-4, Paul, goes to show that there was no effort whatsoever made by respondents Nos. 3 to 6 to get at the petitioners. They appeared to have dealt with the second respondent only. RW-4 admitted that he was not aware whether the second respondent and respondent No. 3 met once or more than once in this connection. There is no acknowledgment obtained from the petitioners for having paid the consideration into the hands of the second respondent. Apart from the share transfer forms, exhibits P-1, P-2 and P-7, pertaining to petitioners Nos. 1, 2 and 5, respondents Nos. 3 to 6 have not produced any other evidence for having paid the consideration to them. Of course, cheques issued in the names of these petitioners are produced. But these cheques were encashed by the second respondent. The cheques do not bear any endorsement by petitioners Nos. 1, 2 and 5. They were not even confronted with those cheques. It is really surprising as to how respondents Nos. 3 to 6 could afford to go on in such a manner without caring whether the owners of the shares had executed transfer forms and received the amount of consideration and agreed to sell the shares. As to what happened to the transfer form alleged to have been executed by the third petitioner, there is no evidence. Therefore, the very basic document pertaining to the transfer of shares of petitioner No. 3 is not produced and proved except stating that the transfer form pertaining to the third petitioner was not traceable. There-fore, in the case of the third petitioner, there is no basic proof as to the transfer of shares by her.

32. As far as Lakshmishappa is concerned, he has admitted his signature on exhibit-3 - share transfer form - regarding the transfer of shares held by him. But he has asserted that he had executed blank transfer forms and it was not intended for transfer, but it was intended to offer the shares as a security for raising the loan

through P. K. Alva. He has further stated that he has not received any consideration. The attempt made by respondents Nos. 3 to 6 is to show that an account-payee cheque was issued in the name of petitioner No. 4 and it was encashed by him by putting the same into his savings bank account No. 1749 in the Canara Bank, M. G. Road branch. Sri Lakshmishappa has asserted in his evidence that he has no savings bank account in any bank and he has not opened any account in the Canara Bank, M. G. Road branch. No doubt exhibit R-3 was not confronted to him and the cheque issued in his name was not confronted to him. It was not difficult for respondents Nos. 3 to 6 to summon the papers pertaining to the opening of the account by Lakshmishappa in the Canara Bank, M. G. Road branch and confront the same, specially when it was his case in the petition, that he had not received consideration. In the evidence also he has specifically asserted that he has not sold his shares to any person.

33. Exhibit R-3 is for the period from April, 1984, to December, 1987. It contains several entries. There are many credit and debit entries. Exhibit R-3 is produced by RW 1, a bank official, who has copied it from the original. Lakshmishappa denied that he had any such account in the Canara Bank, M. G. Road branch, Bangalore. The name and address found in exhibit R-3 tallies with that of Lakshmishappa and it is produced by the bank official. There is no suggestion to RW-1 that exhibit R-3 does not pertain to Lakshmishappa. It is true that the burden is upon respondents Nos. 3 to 6 to prove the transfer of shares and payment of consideration. They should have produced better evidence by producing the cheque issued to withdraw a sum of Rs. 55,000 and also the cheques relating to several debit entries found in exhibit R-3 by issue of cheques by the account holder. If those cheques would have been produced, it would not have been difficult to point out that the account pertained to Lakshmishappa. Now, the evidence before us is that of the bank official and the actual extract of the savings bank account No. 1749 and the denial of Lakshmishappa. The savings bank account No. 1749 in the name of Lakshmishappa maintained by the bank containing debit and credit entries for the period from April, 1984, to December, 1987, in the absence of any further evidence to prove fraud on the part of the bank cannot be rejected and it cannot be brushed aside. Therefore, we are of the view that Lakshmishappa has received a sum of Rs. 55,000 through an account payee

cheque and that amount has been credited to savings bank account No. 1749 of the Canara Bank, M. G. Road branch, Bangalore. There is a debit entry for having drawn the said amount of Rs. 55,000. But the case of Lakshmishappa is that he signed only the blank form; that when he signed exhibit P-3 it did not contain any name and it was only blank; cannot also be brushed aside. This added with the other legal defect that the stamp affixed on the transfer form were not cancelled, should lead to the conclusion that the alleged transfer form was invalid and, therefore, the alleged transfer of shares was not valid in law. Consequently, Lakshmishappa cannot be held to have transferred the shares in accordance with law and cannot be held to have ceased to be a member of the company and ceased to be the owner of 550 shares.

34. According to respondents Nos. 3 to 6, these transfers were approved on February 24, 1986, in the meeting of the board of directors. Consequently, the petitioners ceased to be shareholders of the first respondent company. If the really these transfers had taken place and were approved by the board of directors on February 24, 1986, in exhibit R-21(a) which is an annexure to exhibit R-21 dated November 16, 1986, these petitioners should not have been shown as shareholders of the first respondent-company. RW 4 has admitted in his evidence that the names found in annexure A to exhibit R-21(a) are the names of the then shareholders as on the date of the said agreement. Exhibit R-21 is dated November 16, 1986. It is an agreement entered into between respondents Nos. 3 to 6 and others and Sri K. N. Seshadri in respect of the shares transferred by K. N. Seshadri himself and the members of his group, it is signed by RW 4 and B. R. Srinivasan and also by Sri K. L. Srihari. Annexure A to exhibit R-21(a) contains a list of shareholders in the first respondent-company. The names of the petitioners are found at Sl. Nos. 5 to 9 in the list. The name of the second respondent is also found at Sl. No. 2. Annexure B to exhibit R-21 relates to the list of documents handed over to the second party as per the agreement. One of the documents mentioned therein at Sl. No. 5 relates to the share transfer file. If really there was a transfer form executed by petitioner Nos. 3, it should have been found in that file. But respondents Nos. 3 to 6 have stated that the said form has not been traceable. This circumstance also goes to show that even as on November 16, 1986, the transfer of shares of the petitioners had not taken place. If it had taken place, it

should have been approved and they should have ceased to be members of the company. Consequently, their names could not have been found in annexure A to exhibit R-21. The possibility of respondent No. 2 duping petitioners Nos. 1 to 3 and 5 cannot also be excluded. The petitioners, irrespective of their relationship with respondent No. 2, are in law entitled to take such steps as are open to them in law to safeguard their right, title and interest in the shares held by them in the first respondent-company.

35. Thus, taking into consideration all the facts and circumstances of the case as established by the evidence on record, we answer point No. 1 in the negative though petitioner No. 4 has received a sum of Rs. 55,000 which he has to refund to respondents Nos. 3 to 6.

36. Point No. 2 - This point involves a pure question of law. It is contended on behalf of the petitioners and also by Sri Holla, learned counsel appearing for the second respondent that unless the share transfer forms are properly stamped and registered, there will not be a valid transfer. We consider this point on the assumption that respondents Nos. 3 to 6 have proved the transfer of shares by the petitioners, because under point No. 1, we have held that they have failed to prove the transfer. It is an admitted fact that the transfer forms did bear the stamps but they were not cancelled. Section 108(1) of the Act provides that :

'A company shall not register a transfer of shares in, or debentures of, the company, 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 and specifying the name, address and occupation, if any, 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 or debentures.'

37. It is not the case of respondents Nos. 3 to 6 that the transfer forms were lost. Therefore, it is not necessary to refer to the first proviso to sub-section (1) of section 108 of the Act. Unless the instrument of transfer of shares is duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and 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 or debentures, the transfer cannot at all be registered by the company. This section has been considered in *Nuddea Tea Co. Ltd. v. Asok Kumar Saha* [1988] 64 Comp Cas 775 (Cal) and it has been held (headnote) :

'that the instrument of transfer of shares should bear the requisite stamps and the adhesive stamps should be cancelled at the time of affixation of such stamps and execution of the document. If these requirements are not complied with, then the instrument, although bearing an adhesive stamp but not cancelled in the manner as contemplated by the Indian Stamp Act, 1899, cannot be said to be an instrument 'duly stamped'. The requirement of section 108 is mandatory in nature and the cancellation under section 12 cannot be made subsequent to the execution of the instrument.'

38. In the instant case, all the transfer forms pertaining to petitioners Nos. 1, 2, 4 and 5 have been stamped but the stamps are not cancelled. In the light of the provisions contained in section 12 of the Karnataka Stamp Act and the non-cancellation of the stamps affixed, the instrument concerned must be deemed to be unstamped. The provisions of section 108(1) of the Act and section 12 of the Karnataka Stamp Act are mandatory. These provisions are to be read together. The effect of these provisions is that the document though stamped must be held to be unstamped if the stamps affixed are not cancelled at the time of execution of the document. If the stamps affixed are not cancelled, the document must be held to be not duly stamped. Consequently, it must be held to be invalid.

39. In *Dr. Mrs. Nirmal T. Shah v. Sharavathi Petro Chemicals* (Company Petition No. 38 of 1980 decided on 10-10-1984), Chandrakantharaj Urs J. has held that the provisions contained in section 108(1) of the Act are mandatory. This decision also accords with our view. The burden was on the respondents to prove that when the transfer forms were delivered to be second respondent the same were filled and were duly stamped at the time of execution of the same.

40. In *Arun Kumar Jagnany v. Hindusthan Motors Ltd.* [1984] 2 Comp LJ 270, it has been held (at page 272) :

'Apart from the aforesaid issue of limitation, another basic issue for our consideration is that the stamps on share transfer deeds having not been cancelled, the share transfer deeds have to be taken as unstamped and not in accordance with section 108(1) of the Companies Act read with the provisions of the Indian Stamp Act.'

41. During the course of the judgment, a decision in Mathrubhumi Printing and Publishing Co. Ltd. v. Vardhaman Publishers Ltd. [1992] 73 Comp Cas 88 (Ker), was brought to our notice. In that decision also a Division Bench of the Kerala High Court has held that under section 12 of the Indian Stamp Act, 1899, cancellation of the stamps has to be done either when the stamps are affixed or when the instrument is executed, that is, when the executant affixes his signature to the instrument. The cumulative effect of the sections contained in Part B and Part C of Chapter II and those contained in Chapter IV of the Indian Stamp Act is that an instrument, in order to be produced in evidence, registered or acted upon, must be duly stamped. And, therefore, if the instrument is not properly executed or the stamp affixed to the instrument is not cancelled before execution or at least at the time of execution, the said instrument must be deemed to be unstamped. The provisions of section 12 are mandatory, and, therefore, non-compliance with the requirements prescribed thereunder make the instrument not duly stamped and, therefore, it shall not be received in evidence, registered or acted upon.

42. Of course, with regard to this illegality, it is the contention of Sri Jayaram, learned counsel for respondents Nos. 3 to 6 that respondents Nos. 3 to 6 being the purchasers of the shares have come into the picture later and any illegality that has been committed either during the process of transfer of shares of earlier to that, they cannot be held responsible.

43. We may point out that respondents Nos. 3 to 6 being the purchasers of the shares, they were also under the legal obligation to ensure that the transfer of shares took place in accordance with law. There cannot be a valid transfer of shares unless the share transfer forms are duly stamped. Therefore, it is not possible to hold that the contention of the petitioners based on section 12 of the Karnataka Stamp Act read with section 108 of the Companies Act is without any

substance merely on the ground that respondents Nos. 3 to 6 have come into the picture later. They are the purchasers of the shares. They must prove that under the valid document the shares are transferred to them. Therefore, we are of the view that even assuming that respondents Nos. 3 to 6 have proved that the petitioners have transferred their shares, as the adhesive stamps affixed on the shares transfer forms are not cancelled, the share transfer forms must be held to be unstamped and, therefore, the instruments must be held to be invalid. We hold accordingly.

44. At this stage, we may also refer to an argument advanced on the basis of the articles of association of the first-respondent-company. It is contended that the shares of the company shall not be transferred except to a person agreed to by all the directors of the company at the price fixed by the board of directors. In our view, it is not necessary to consider this contention in the light of the finding recorded on point No. 1.

45. For the reasons stated above, we answer point No. 2 as follows :

The transfer of shares held by the petitioners even assuming that there was such a transfer of shares as claimed by respondents Nos. 3 to 6 by the petitioners, it was not effected in accordance with section 108(1) of the Companies Act read with section 12 of the Karnataka Stamp Act, and, therefore, was not valid in law. Therefore, the petitioners continue to be shareholders of the first respondent-company and as such continue to be its members.

46. Point No. 3. - The petitioners, apart from seeking relief concerning them, have also sought for rectification of the register of members of the company of the first-respondent company pertaining to other members of the company. The rectification of the register of members pertaining to other shareholders whose names are mentioned in the petition as well as in the prayer portion of the petition. The contention of the petitioners is that section 155 of the Companies Act is wide enough to enable the petitioners to seek rectification of the register of members of the first-respondent company pertaining to other members other than the petitioners. The rectification is sought on the ground that the transfer of shares by those shareholders has not taken place in accordance with law, inasmuch as on

the dates on which these transfers are alleged to have taken place, no meeting of the board of directors had taken place. It is contended that on October 14, 1984, April 6, 1985, May 18, 1984, and November 16, 1986, several shares pertaining to the other members whose names are mentioned in the petition are alleged to have been transferred. But in fact, no meeting of the board of directors took place on those dates and no distinctive numbers were assigned and the shares transferred were more than the shares allotted by the company and the same distinctive numbers were given to several others. It is submitted that section 155 of the Act is wide enough to enable the petitioners to seek and the court to grant such a relief. On the contrary, it is contended by Sri Jayaram, learned counsel appearing for respondents Nos. 3 to 6 that those persons who are not the petitioners and who have transferred their shares on receiving the consideration and have no grievance to make; if at the instance of the petitioners they are to be restored as shareholders of the company, on certain irregularities in the proceedings and in the records of the company in the matter of transfer of shares, this court will be restoring the contract without affording an opportunity to one of the contracting parties and without ascertaining as to whether they are still ready to continue as members of the company. It would amount to forcing the contract upon them and the court cannot make a contract for the parties. It is also submitted that without those persons before the court, no such relief can be granted. It is also further contended that the nature of the proceeding under section 155 of the Act being a summary proceeding, the question as to whether the persons other than the petitioners have transferred the shares, etc., need not be gone into. If the other persons are aggrieved, it is always open to them to seek redressal in accordance with the provisions of the Act.

47. Under this point, we are also required to consider the scope of section 155 of the Act. Section 155 of the Act, no doubt has not been omitted and it has become part of section 111 of the Act by reason of the Companies (Amendment) Act, 1988, which has come into force subsequent to the filing of the petition. The petition was filed on June 9, 1988. Therefore, we have to consider this case under the Act as it stood prior to the coming into force of the Companies (Amendment) Act, 1988 (Act No. 13 of 1988), in the light of the provisions contained in section 68 of the Companies (Amendment) Act, 1988. Though section 21 of the

Companies (Amendment) Act, 1988, omits sections 155 and 156 of the Act but section 16 of the very Amendment Act, 1988 (Act No. 13 of 1988), while substituting section 111 of the Act incorporates section 155 of the Act with certain modifications in section 111 as substituted. As per the substituted section 111 of the Act, the jurisdiction to consider the application for rectification of the register of members of the company no more vests with a district court or a High Court but vests with the Company Law Board. As already pointed out, we have to consider this case under section 155 of the Act as it stood prior to its omission from the Act. Therefore, we refer to the provisions contained in section 155 of the Act which were as follows :

'155. (1) If -

(a) the name of any person -

(i) is without sufficient cause, entered in the register of members of a company, or

(ii) after having been entered in the register is, without sufficient cause, omitted therefrom; or

(b) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be a member;

the person aggrieved or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either reject the application or order rectification of the register; and in the latter case, may direct the company to pay the damages, if any, sustained by any party aggrieved.

In either case, the court in its discretion may make such order as to costs as it thinks fit.

(3) On an application under this section, the court -

(a) may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the

question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and

(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(4) From any order passed by the court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure, 1908 :

(a) if the order be passed by a District Court, to the High Court;

(b) if the order be passed by a single judge of a High Court consisting of three or more judges, to a Bench of that High Court.

(5) The provisions of sub-sections (1) to (4) shall apply in relation to the rectification of the register of debenture holders as they apply in relation to the rectification of the register of members.'

48. The Supreme Court in *Public Passenger Service Ltd. v. M. A. Khadar* : [1966]1SCR683 has held that (headnote of AIR) :

'Where by reason of its complexity or otherwise the matter can more conveniently be decided in a suit, the court may refuse relief under section 155 in exercise of the discretionary jurisdiction and relegate the parties to a suit.'

49. In that case, it was held that as the case did not involve complicated question, there was no necessity to drive the parties to a suit. It was also pointed out that the rectification of the share register should be allowed if the name of the person after having been entered in the register was without sufficient cause omitted from it. There was no sufficient cause for the omission of the name of the shareholder from the register and the omission was due to invalid forfeiture. In that view of the matter it was held that the forfeiture was invalid. Therefore, it was necessary to grant relief to restore the names of the shareholders.

50. In *Indian Chemicals Products Ltd. v. State of Orissa* : AIR 1967 SC253 , the provisions of section 38 of the Act were considered. The provisions contained in

section 38 of the Indian Companies Act, 1913, were similar to section 155 of the Act ([Companies Act, 1956](#)). In that case, the State of Orissa claimed that by reason of successive constitutional changes, the shares held by the Maharaja Mayurbhanj became vested in the State of Orissa, therefore, it be entered in the register of members of the company. The board of directors refused to register the State of Orissa as successor to the shares held by the Maharaja. Therefore, a petition under section 38 of the Indian Companies Act, 1913, was filed in the High Court of Orissa and the same was allowed. In the appeal, the Supreme Court confirmed the order of the High Court and held as follows (at page 596) :

'Though the State of Orissa had acquired title to the shares by operation of law, by way of abundant caution, it obtained a deed of transfer and lodged it with the company together with the share scrip. The transfer deed was duly stamped and complied with all the formalities required by law. The claim of the State of Orissa based upon the transfer deed was within the purview of article 11. Even with regard to this claim, the courts below concurrently held that the board of directors acted mala fide in refusing to register the transfer. This finding is amply supported by the materials on the record.'

51. Ultimately, in para 11 of the judgment, the Supreme Court held as follows (at page 597) :

'The Maharaja of Mayurbhanj has ceased to be the owner of the shares. The State of Orissa is now their owner and has the legal right to be a member of the company and is entitled to say that the company should recognise its membership and make an entry on the register of the fact of its becoming a member and its predecessor-in-title having ceased to be a member. The name of the State of Orissa has without sufficient reasons been omitted from the register and there is default in not entering on the register the fact of the Maharaja having ceased to be a member. The court's jurisdiction under section 38 is, therefore, attracted. The High Court rightly ordered the rectification in the exercise of its summary powers under section 38. The jurisdiction created by section 38 is very beneficial and should be liberally exercised. We see no reason why the court should deny the applicant relief under section 38. The directors of the applicant company on the

most frivolous of objections have prevented the State of Orissa from becoming a member for the last 16 years. It is a matter of regret that justice has been obstructed so long. There is no merit in this appeal.'

52. Therefore, it is clear from the aforesaid decision that even a complicated question as to whether the board of directors acted mala fide in refusing to register the State of Orissa as a member of the company was gone into in a petition filed under section 38 of the Indian Companies Act, 1913, and it was approved by the Supreme Court. It was also specifically observed that the jurisdiction created by section 38 was very beneficial and should be liberally exercised. The learned company judge has also noticed this decision.

53. The High Court of Gujarat in *Gulabrai Kalidas Naik v. Laxmidas Lallubhai Patel of Baroda* [1978] 48 Comp Cas 438, has taken a view that in a proceeding under section 155 of the Companies Act, even if the relief sought for involves complicated questions they can be gone into and if a case is made out, the relief can be granted. The same is the view expressed by the High Court of Kerala in *K. P. Anthony v. Thandiyode Plantations (P.) Ltd.* [1987] 62 Comp Cas 553.

54. Thus, the conspectus of these decisions lead us to a conclusion that even though the proceeding under section 155 of the Companies Act is a summary proceeding, as it is a relief provided under the statute, in a proper and appropriate case, it is open to the court to grant relief even though it may involve complicated questions of law and facts. Whether in a particular case relief should be granted or not, because the jurisdiction is discretionary as the word used is 'may' in section 155 of the Act, would depend upon the facts and circumstances of the case but the exercise of jurisdiction cannot be refused on the ground that it involves complicated questions of law and facts. Of course, the propriety of the petitioners and their conduct having a bearing on the subject-matter of the petition would be relevant to the decision as to whether the discretion should or should not be exercised. In the instant case, in the light of the findings recorded already, it is not possible to agree with the view of the learned company judge that the petitioners are not entitled to the discretionary relief. In a case like this, declining to exercise the jurisdiction would amount to failure to exercise the jurisdiction.

55. It is contended by Sri. A. N. Jayaram, learned senior counsel appearing for respondents Nos. 3 to 6, that section 155 of the Act incorporates equity jurisdiction. The petitioners who have transferred the shares through respondent No. 2 and thereafter it is respondent No. 2 who has set them up, their conduct is not bona fide, therefore, in equity they are not entitled to invoke the jurisdiction under section 155 of the Act and the court will not be justified in exercising jurisdiction in their favour. It is also submitted that it is well-known that he who comes into equity must come with clean hands. As long as it is not proved that petitioners Nos. 1, 2, 3 and 5 are not paid the consideration and petitioner No. 3's transfer form itself has not been produced and one of the petitioners only affixed her thumb mark and does not know how to sign; even then her signature is found on the transfer form, the transfer forms are invalid as pointed out under point No. 2, it is not possible to hold that the petitioners are not entitled to invoke jurisdiction under section 155 of the Act. If in such a case the court refuses to exercise the jurisdiction under section 155 of the Act, it would be only putting a premium on the several illegalities noticed by us during the course of this judgment pertaining to the alleged transfer of shares by the petitioners. Any illegality or any conduct lacking in bona fides on the part of the second respondent, cannot be passed on to the petitioners so as to deprive them of their existence in the company as shareholders. They are entitled to protect and safeguard their existence within the four corners of law as shareholders of the company. Therefore, we are of the view that the petitioners cannot be refused relief on the ground that they lack bona fides as they cannot be held to be guilty of such conduct, we are of the view that it is not proved that petitioners Nos. 1, 2, 3 and 5 have committed any act which lacks bona fides. Of course, as far as Lakshmishappa is concerned, we have already pointed out with regard to receiving of a sum of Rs. 55,000 stated to be the consideration for transfer of 550 shares. But in this regard we have already pointed out that the share transfer form executed by Lakshmishappa is invalid. Therefore, the transfer of share from Lakshmishappa in law cannot be held to have taken place. Therefore, Lakshmishappa cannot be held to have ceased to be a member of the company. Hence we are of the view that the petitioners cannot be refused relief in so far as it relates to them. But the relief sought for by them relating to other members of the company other than the petitioners who have sold

their shares, we are of the view that the same cannot be granted in this petition because we do not know whether others are willing to continue as members of the company and in that event first they must be prepared to refund the money they have received towards the transfer of shares and must also be willing to continue as members of the company with all the consequences that flow from it. It is true that section 155 of the Companies Act is widely worded and it is possible in a given case to grant relief covering the persons other than the petitioners who invoke jurisdiction under section 155 of the Act. In the instant case, all those persons who have transferred their shares as long back as in the year 1986 have not chosen to make any grievance even to this day. In such a situation if we accede to the request of the petitioners, as contended by Sri Jayaram, learned counsel for respondents Nos. 3 to 6, we would be forcing a contract upon all those persons who are not before us to continue to be the shareholders of the company. Hence we are of the view that rectification of the register of members of the company sought for the petitioners in respect of the persons other than the petitioners, as stated in the petition, cannot be granted in this petition. However, we make it clear that several grounds urged for the rectification of the register in respect of others, will be available to the petitioners to urge the same in a petition for winding up. Therefore, we do not want to express any opinion finally with regard to several other illegalities such as, duplication of distinctive numbers, transfer of shares of other members increasing the number of shares, the meetings of the board of directors alleged not to have taken place on October 24, 1985, April 6, 1985, and April 5, 1984, the dates on which the several transfer of shares are stated to have taken place as per the proceedings of the minutes of the board meeting, non-issue of the share certificates, etc., as alleged in the petition. These grounds, if proved, do fall within the scope of just and equitable grounds for winding up of the company, in the connected company petition which has been dismissed on the ground that the petitioners have ceased to be members of the company. Therefore, we do not propose to consider the several other illegalities alleged in the petition and the evidence adduced in that regard in this case. As already pointed out, the same can be urged and gone into in a petition for winding up which is filed by the petitioners. Accordingly, point No. 3 is answered as follows

:

'It is not just and proper and it is also not necessary to go into the transfer of shares of several other members of the first respondent-company other than the petitioners and to grant rectification of the register of members of the first respondent-company in respect of those persons except the petitioners.'

56. The contentions urged in this regard are left open to be urged in the petition for winding up being Company Petition No. 48 of 1987 filed by the petitioners-appellants.

57. Point No. 4. - In the light of the findings recorded by us on points Nos. 1 to 3, we are of the view that the order passed by the learned company judge cannot be sustained in law and on facts. Point No. 4 is answered accordingly.

58. Point No. 5. - In the light of the findings recorded on points Nos. 1 to 4, the appeals O.S.A. Nos. 16 and 19 of 1990 are entitled to succeed in part. They are accordingly allowed in the following terms :

The order under appeal is set aside. The transfer of the shares alleged to have been made by the petitioners in favour of respondents Nos. 3, 5 and 6 are declared as invalid and null and void and the same are set aside. It is also further declared that the petitioners continue to be the members of the company with the shares held by each of them as pointed out in the earlier portion of the judgment.

59. The register of members of the first respondent-company shall be rectified accordingly showing the petitioners as members of the company with the shares held by them.

60. It is open to respondents Nos. 3 to 6 to take such action as is open to them in law regarding the amount of Rs. 55,000 received by Lakshmishappa, towards the alleged transfer of shares by Lakshmishappa which is held as invalid and null and void.

61 The other reliefs sought for in the petition and the grounds urged in support thereof have a bearing on the relief sought for in Company Petition No. 48 of 1987 filed by these very appellants, as such the same are left open to be urged in Company Petition No. 48 of 1987. Therefore, it is open to the appellants to urge

them in Company Petition No. 48 of 1987.

62. In the facts and circumstances of the case, parties are directed to bear their own costs throughout.

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