

Khadija and anr. Vs. P.K. Mohammed P. Ltd. and ors.

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Court : Kerala

Decided On : Oct-01-1982

Reported in : [1985]58CompCas543(Ker)

Judge : K. Sukumaran, J.

Acts : [Contract Act, 1872](#) - Sections 176; [Companies Act, 1956](#) - Sections 28

Appeal No. : S.A. No. 1219 of 1979-D

Appellant : Khadija and anr.

Respondent : P.K. Mohammed P. Ltd. and ors.

Advocate for Def. : T.S. Venkiteswara Iyer,; P.K. Balasubramanyan and; M. Pa

Advocate for Pet/Ap. : T.L. Viswanatha Iyer,; P.S. Narayanan,; K.S. Menon,;

Disposition : Appeal dismissed

Judgement :

K. Sukumaran, J.

1. Plaintiffs in O.S. No. 71 of 1971, before the Sub-Court, Cochin, are the appellants in the second appeal. Defendants Nos. 1 and 3 and the legal representatives of the deceased second defendant who had been impleaded as additional respondents Nos. 4 to 9 in the court below, are the respondents. The

first defendant is the company known by the name and style of 'P.K. Mohammed (P.) Ltd.' Defendant No. 3 is a director of the company. Till his death the second defendant too was its director. Though the contentions between the parties originally ranged over a larger area, the arguments in the second appeal mainly relate to two questions : (i) the effect of the sale on September 13, 1956, of the ninety shares then held by P.K. Mohammed, in auction in favour of the second defendant and the impact of Exts. A-1, and A-2 on those shares, and (ii) the claim relating to thirty-three shares originally held by P.O. Kamaludin, husband of the first plaintiff and father of the second plaintiff, on the demise of Kamaludin, on February 16, 1957, and the impact of the sale of the shares in auction for the debts of Kamaludin.

2. The facts relevant for the two questions pressed before this court in the second appeal may briefly be stated as follows : The first defendant is a private limited company incorporated in the year 1953. Its share capital as in 1957, consisted of 183 fully paid-up shares of Rs. 180 each, 33 shares held by Kamaludin, 90 shares by P.K. Mohammed and 60 shares by A.S. Sankunny. The shares of P.K. Mohammed were sold in auction on September 13, 1956. They were purchased by the second defendant and duly transferred in his name. That the second defendant is his nephew is an admitted fact. That he was a dependant of P.K. Mohammed and without any means of his own is the allegation of the plaintiffs. The transfer of shares, according to them, was, therefore, a sham transaction. P.K. Mohammed was the teal owner of the shares and continued to receive dividends and other benefits till his death oh August 24, 1970, according to the plaintiffs. The first plaintiff is the adopted daughter of P.K. Mohammed, On May 15, 1963, P.K. Mohammed wrote a letter Ext. A-1, wherein he expressed his view that the first plaintiff is to utilise in her individual capacity the dividend at the rate of 9 annas 4 pies in a rupee, on all the shares in P.K. Mohammed (p.) Ltd., kept by him in the name of the second-defendant, P.C. Mohammed. The letter was to be retained by Khadija Umma, the first plaintiff, till the death of P.K. Mohammed and was to be shown to the second defendant, P.C. Mohammed, if felt necessary. After the death of P.K. Mohammed, the letter was shown to the second defendant and Ext. A-2 agreement Was executed on October 2, 1970, whereunder the directions of Ext. A-3 are claimed to have been incorporated. Kamaludin had

married the first plaintiff and to them was born the second plaintiff. Till his death on February 16, 1957, Kamaludin was living with P.K. Mohammed along with the plaintiffs. It was averred that neither P.K. Mohammed nor Kamaludin had any necessity to borrow any amount from the company. In the wake of the death of Kamaludin and the later demise of Kamaludin's mother, the plaintiffs claimed to have become the full owners of the shares held by Kamaludin.

3. The demand made by the plaintiffs after the death of P.K. Mohammed for rectification of the share register of the company by showing the first plaintiff as the shareholder in respect of 52 $\frac{1}{5}$ shares out of the 90 shares dealt with under Exts. A-1 and A-2 and of the 33 shares held by Kamaludin, was declined by the company pointing out the sale in auction of those shares. The plaintiffs alleged that the second, plaintiff was not given notice in relation to the sale proceedings of Kamaludin's 33 shares. Ultimately, the plaintiffs sought a declaration that the first plaintiff is the owner of 52 $\frac{1}{5}$ shares and the two plaintiffs together to 33 shares, the former claim grounded on Exts. A-1 and A-2 and the latter on the contention about the invalidity of sale in auction by the company on September 13, 1958, in purported enforcement of the Hen of the company on the shares, for the debts due to the company from Kamaludin.

4. The suit was resisted by the defendants. The contentions are more or less similar. It was stated that P.K. Mohammed owed a liability amounting to Rs. 4,100-12-4 to the company for which his 90 shares had been hypothecated. The company by resolution dated July 23, 1956, desired to recover the amount by the sale of the shares. Notice was issued to P.K. Mohammed on July 13, 1956, demanding the amount. The demand not having been, complied with, despite issue of even subsequent notices on August 22, 1956, and September 10, 1956, the shares were sold in auction and were consequently transferred in the name of the auction-purchaser, the second defendant. Similarly, an amount of Rs. 3,559.28 was due from Kamaludin when he died on February 16, 1957. This amount was resolved to be realised from the legal heirs. Registered notice was issued to the first plaintiff, she being the widow of the late Kamaludin and the guardian of the second plaintiff. Notice was also issued to another heir, Ummacha, the mother of Kamaludin. Despite the clear intimation about the proposal to auction the shares in

default of payment of the dues in respect of which the company had a paramount lien, the amount was defaulted. The shares were accordingly sold in auction. In the light of these events, of which, it is contended by the defendants, the plaintiffs had adequate and due notice, the plaintiffs had no cause of action in relation to the two sets of shares.

5. The second defendant raised an additional contention that it was out of pity for the plaintiff and heeding the advice of some well-wishers, and taking into consideration the last wish of P.K. Mohammed that the agreement, Ext. A-2, was executed providing for payment to the plaintiff of a portion of the income accrued from the shares which were originally held by P.K. Mohammed. The claim relating to adoption of the plaintiff as a daughter of P.K. Mohammed was refuted on the ground that such adoption was unknown to Mohammedan law. It was also contended that the first plaintiff had not acquired any ownership of the shares under the agreement.

6. Though the civil court's jurisdiction to try the suit was contested, the trial court upheld its jurisdiction to try the same. A plea of limitation raised in the case was also negatived by the trial court. The plea of mis-joinder of cause of action was also repelled. The trial court also entered the finding in favour of the plaintiff on issue No. 5 by holding that there were no laches or acquiescence on the part of the plaintiffs as alleged by the defendants. Inasmuch as these findings are no longer under challenge, it is not necessary to deal with those matters in detail in this judgment.

7. The matters covered by the two questions raised in the second appeal, have been discussed while considering issues Nos. 4, 6 and 7. It was held that the sale in relation to the shares of P.K. Mohammed was not sham. On the question whether the transfer of the shares in the name of P.C. Mohammed even during the lifetime of P.K. Mohammed was benami, the trial court referred to the ingredients of a benami and the heavy burden on the plaintiffs to establish the same, and observed :

'From the evidence adduced, I am not satisfied that any of the above grounds except the relationship between the parties has been established.'

8. The reference in Ex. A-1 about the shares having been kept in the name of the second defendant was found to be of no avail to the plaintiffs in establishing their contention, after a detailed examination of the circumstances under which Ex. A-1 was written and an evaluation of the claim of the second defendant in the written statement about the circumstances under which Ext. A-2 agreement was executed, The letter, Ext. B-2, dated April 2, 1956, found to be a genuine letter, despite the contention to the contrary by the plaintiff, Was found to be one Which cuts at the root of the plaintiffs' case of benami in so far as it 'discloses the existing debt'. The indebtedness of P.K. Mohammed had been established by Ext. B-13 and Ext. B-14 as also the account books, Ext. B-18 series. The books of the company containing resolutions, Ext. B-21 and B-21(a), were also relied on to support the finding of the trial court, The trial court could not find anything in the letters, Exts. A-7 to A-14, covering the period, June 3, 1963, to November 1, 1963, relied on by the plaintiffs, to show that P.K. Mohammed played a prominent role in the affairs of the company or to indicate that he continued to be a shareholder of the company or that the transfer was benami. The explanation of the second defendant as D.W. 1 that such letters were written by defendants Nos. 2 and 3 out of respect for P.K. Mohammed and taking into account his past services, appealed to the trial court. It observed :

'The mere fact that even after the assignment of the shares, certain letters written by the directors of the Company to P.K. Mohammed touched on certain affairs of the company is not sufficient to hold that the assignment of the shares was benami.'

9. The trial court further held that the first plaintiff could not claim transfer of shares in her name even on the hypothesis that the assignment in favour of P.K. Mohammed was not supported by consideration for the reason that she is not a legal heir of the deceased, P.K. Mohammed. As Mohammedan law did not recognise adoption, the first plaintiff could not base her claim on the adoption pleaded by her. It was found that the second defendant had scrupulously adhered to his obligations under the agreement, Ext. A-2, entered into with the first plaintiff. It concluded the discussion in relation to the 90 shares with the following words :

'.....apart from claiming the share of the dividend as provided for in Ext. A-2, the first plaintiff cannot successfully sustain a claim over any portion of the 90 shares held by P.K. Mohammed and purchased by the second defendant.'

10 The question relating to the validity of the 33 shares belonging to Kamaludin was thereafter considered. The right of the first defendant-company of resorting to a private sale of the shares as contained in Ext. B-8, memorandum and articles of association, was referred to. Notices had been issued to the mother and widow of Kamaludin intimating them about the amount due to the company by Kamaludin, demanding payment of the same and intimating them that the shares would be sold for realisation of the debt in the event of their not liquidating the liability. The mother acknowledged Ext. A-5 by Ext. B-22 dated December 21, 1957. The first plaintiff widow to whom a similar letter, Ext. A-6 had been sent on September 9, 1957, acknowledged it by Ext. B-1 dated September 18, 1957. According to the first plaintiff, those letters were received by P.K. Mohammed himself and that she came across those letters only when a search was made on the table of P.K. Mohammed, when the reply notice, Ext. A-4, was received by her from the first defendant-company's lawyers in reply to the notice sent on behalf of the plaintiffs. The trial court felt that notice to the first plaintiff should be deemed, to be sufficient notice even as against the second plaintiff, relying on the observations of the Supreme Court in *Kanji Manji v. Trustees of the Port of Bombay*, AIR 1963 SC 468. It further held that the right of the second plaintiff was restricted to a claim for damages even in case it is found that there was no notice for the sale of the shares. According to the trial court, that circumstance would not render the sale void. In the light of the above findings, the trial court held that the plaintiffs could not impeach the sale of Kamaludin's shares either. The suit was accordingly dismissed but without any order as to costs.

11. The plaintiffs preferred an appeal. Each of the defendants filed separate memorandum of cross-objections as regards the adverse findings recorded against them. However, before the court below, arguments were confined to matters covered by issues Nos. 4, 6 and 7. The claim of the first plaintiff as an heir, of late P.K. Mohammed was not pressed before that court. In relation to the 90 shares, arguments were confined to the legal effect of Exts. A-1 and A-2. In

relation to the 33 shares, the contention related to the non-issue of notice and the sale being void on that account. The nature of the contentions raised by the respondents-defendants as regards those 33 shares is indicated in the following observations of the court below :

'As regards the 33 shares, the learned counsel appearing for the respondents objected to the finding of the court below that the sale was without proper notice to the legal representatives of Kamaludin and Contended that the theory of substantial representation adopted by courts throughout is applicable to the facts of the present case and submitted that the suit without offering to redeem the debt even if the sale was attended with illegality or irregularity is not maintainable and further contended that if at all the plaintiffs have any remedy, it can only be of damages.'

12. It is obvious that the contention relating to 90 shares in the appellate court took a different form. The claim was based on the provisions of Ext. A-2. It was essentially centering round a provision in Ext. A-2 about the agreement to pay a portion of the dividend to the first plaintiff as also to her successors. This provision was equated to a bequest in perpetuity. It was then transmuted to the position of a gift of income in perpetuity and, consequently, a gift of the corpus itself to all intents and purposes. Judicial decisions interpreting gifts and bequests unlimited in point of time and unimpeded by restrictions and limitations were referred to in support of the contention. The court below, however, extracted the entire text of Ext. A-1 and Ext. A-2; analysed their provisions and came to the categorical conclusion that Exts. A-1 and A-2 did not justify a claim to the income generating corpus, namely, the shares in the company.

13. As regards the sale of 33, shares, the court below also rejected the plaintiffs' contention questioning the reality of the indebtedness of Kamaludin, It accepted the books of account as genuine and found that such books of account, Exts. B-18, B-19 and B-20, did establish the indebtedness of Kamaludin. It, however, felt that the defence contention relating to substantial representation in relation to the sale proceedings of the shares was not acceptable. The decisions urged by the defendants, according to the court below, were all decisions in relation to court

sales and not private sales by a company in the exercise of its tight to lien.. The distinction, which, according to the court below, existed-between the two types of sales, was pointed out in the following sentence :

'Ample safeguards are provided in the CPC and the rules regarding court sales and a private right of sale exercised by a company cannot be equated to court sale.'

14. In that view of the matter, it took the view that the sale must be deemed to be one without proper notice. It, however, entered a finding that it would have been sufficient if the notice had been issued to the mother as a next friend of the minor, even if the mother was not a legal guardian of the minor under the Mohamedan law. The contention that the notices, Exts. A-6 and A-5, were bad to the extent they did not specify the particulars of sale as regards the time, place and amount due, was also rejected by the lower appellate court. The shares having been found to be sold without proper notice, the court below further held that the provision, in Ext. B-8, the memorandum and articles of association, particularly Clauses 11 to 13, thereof, and the provision which expressly stipulates that shares sold and purchased in the exercise of lien, will, not be affected by any irregularity or invalidity in the proceedings, did not avail the defendants, inasmuch as the heirs of Kamaludin did not find a place in Ext. B-26 share register. According to the court below, due to that circumstance, the plaintiffs could not be treated as parties to the contract and to the provisions of the Companies Act or the articles in Ext. B-8.

15. Even on the hypothesis that the sale was, therefore, defective On the ground that no notice was issued to the second-plaintiff, it took the view that in the case of a sale without proper notice, the pledgor was only entitled to damages. In particular, it referred to and relied on the second proposition laid down by Chagla J., as lie then was, in the decision in Official Assignee, Bombay v. Madholal Sindku, AIR 1947 Bom 217, reading 'that Without a proper tender of the amount due on the pledge, the only right of the pledger in respect of an unlawful or unauthorised sale is in tort for damages actually sustained by him', arid ultimately held that in view of the plaintiffs not offering to redeem the pledge, and the suit not being one for damages, the plaintiffs were not entitled to any relief. The appeal

was accordingly dismissed along with the cross-objections.

16. As stated earlier, arguments were addressed on the two questions referred, to above. I shall consider them seriatim.

17. It is perhaps unnecessary to go behind the general proposition that 'a gift unlimited in point of time of the income of a fund is a gift of the fund itself'. The reason for the rule is that 'it would be absurd to say that the income arising, from a fund was for all time to be paid to one person while the corpus of the fund was to belong to some one else'. This is, however, subject to a qualification pointed out in Theobald on The Law of Wills, 14th edition, page 472, which occurs after the passage indicating the general proposition referred to above based on *Mannox v. Greener* [1872] LR 14 Eq Cas 456.

'But a devise of a specific annual sum out of land, though it happens to be the whole amount of the rents and profits, will not carry 'the land.'

18. However, this principle was correctly described by Warrington J., as 'rather perhaps one of construction'. See the observations in *Lawes-Wittewronge, In re : Maurice v. Bennet* [1915] 1 Ch 408. Perhaps this decision is the one which would be nearest to the facts of 'the case and, therefore, of greatest relevance and assistance to the plaintiffs. The notion generally applicable to bequests and gifts of land were, applied in that case to the shares in a limited company. The learned judge observed (at p. 412 of [1915] 1 Ch):

'What I have to consider is whether the rule is applicable to the case of dividends derived by a shareholder from shares in a limited company. I can see no reason why it should not be; Dividends arising from a share in a limited company are the fruit of the share, and, therefore, a gift unlimited in time of the dividends on a share in a company is as much a gift of the share as a gift of the income of, a sum of Consols is a gift of the sum itself.'

19. It must, however, be remembered that the rule is one of construction. The words which the court had to consider, in the above case were to the following effect (at p. 408 of [1915] 1 Ch) :

'I..... leave one-fifth share of the net profits in all my commercial undertakings.....;to Charles Maurice.....'

20. As would be revealed from the summary occurring at page 411 of the report, the contention was :

' The true meaning of the testator, judged by the surrounding circumstances, was that the plaintiff should do his best to get back all moneys sunk by the testator in these companies, whether in the form of shares, debentures or loans, and that he should be entitled to receive one-fifth of the whole amount which he succeeded in so recovering.'

21. The term 'net profits' occurring in the codicil referred to above were considered by the learned judge and he observed (at p. 413 of [1915] 1 Ch):

' What can a gift of 'net profits' in a limited company mean except a gift of that which the testator was entitled to receive on Ms shares in the company? A shareholder is entitled to the dividends which are duly declared according to the articles of association of the company, and, therefore, a gift of the profits of shares amounts to a gift of the dividends on them, and that amounts to a gift of the corpus of the shares.'

22. The point, however, to be noted is that the rule is one of construction and getting at the intention of the parties, as disclosed from the document to be construed. ' It is possible to displace the general rule in given circumstances. That appears to be the effect of the decision in *Blann v. Bell* [1852] 5 De G & Sm 658, 663.

23. If, therefore, the crux of the matter is the construction of the agreement Ext. A-2, the rule referred to may be a good guide in the construction of the document but not conclusive thereon. The document would have to be construed on its terms and the real intention ascertained by a careful consideration of the terms thereof.

24. The court below has, as noted earlier, emphasised all important aspects revealed in Ext. A-2, which would completely rule out a gift of the corpus in the shares of the company.

25. The consideration of the document must be with necessary advertence to the fact that it is an agreement between the second defendant and the first plaintiff. It refers to Ext. A-1 letter of P.K. Mohammed. Thereafter, it states ' that the first party to the agreement thereby agreed to pay over to the second party eight paise in the amount derived on the dividend warrants for everyone of the years, starting with the year ending October 1, 1970, in relation to Rs. 9,000 worth shares which partyNo. 1, has in the company, P.K. Mohammed P. Ltd.' In other words, the ownership of the shares as inhering in party No. 1 is reiterated in the very same agreement under which the second party, namely, the 1st plaintiff obtains rights as pleaded in the appeal. Detailed provisions have also been made for the weekly payments towards the total amounts due to the second party. A sum of Rs. 25 is to be paid every week. If at the end of the year, it is found to be short of the amount due to her, the balance has to be made good. If, on the other hand, party No. 2 has been in receipt of excess amount, that has to be refunded to the first party. These provisions normally could not have any place in a document by which the corpus of the shares is, for once and all, parted in favour of party No. 2. If the least doubt be lurking in the mind, that is completely removed by a crucial and categoric provision which follows thereafter. It reads :

' Is is also mutually agreed that apart from the amount referred to above, there is no further claim or right whatever either between themselves or over the company... '.

26. That the first party does not have any semblance of rights over the shares or in the company is thus made explicit. An agreement whereunder a specified share in the annual dividend is parted with, cannot with justification, be equated to the assignment of the shares themselves. It is not as though the simple process of a transfer of shares, and the concomitant procedure under the Companies Act and under the articles of association in relation to such transfer of shares, were not known either to P.K. Mohammed or to the second defendant who is party No. 1 in Ext. A-2. A deliberate departure from a commonly known and a simplified procedure relating to transfer of shares must be given due importance when a party parts with a share of the dividend received by him in respect of a block of shares. As a matter of construction therefor, it could be stated that an assignment

of the corpus of the shares was farthest from the intention of the parties. The conclusion of the court below on the interpretation of this document is perfectly correct on a proper reading of the document. The stipulation that the agreement is applicable to the successors of parties Nos. 1 and 2 does not affect at all the intention of the parties expressed so clearly, which rules out an assignment of the corpus in the shares. In that view of the matter, there is no merit in the submissions of counsel for the appellants on this aspect of the case.

27. In the above circumstances, it is unnecessary to refer to the other decisions relied on by counsel for the appellants which include the following:

Vaithinatha Aiyar v. S. Thyagaraja Aiyar, AIR 1921 Mad 563, C. Venkatachariar v. Bontham Pachayappa Chetti, AIR 1926 Mad 250, Madhavrao v. Balabhai, AIR 1928 PC 33. The decisions in Southampton (Mayor, etc., of) v. A.G., (10 English Reports 79 and Mannox v. Greener [1872] LR 14 Eq Cas 456, have been referred to in the decision in C. Venkatachariar v. Bontham Pachayappa Chetti, AIR 1926 Mad 250. This decision construed an agreement dated September 4, 1845, which was not available in that case, though its recital in an earlier case could be got at for the interpretation. The agreement was interpreted in the light of the admission of parties about its effect in earlier judgments and documents and court proceedings. Ultimately, the court observed (at p. 251 of AIR 1926 Mad): ' This seems to me to be sufficient to show that what was really granted was not only one-third share in the income but one-third of the village itself and that was what both parties in the past have thought was the meaning of the agreement.'

28. Then came the observations of the court (at p. 251 of AIR 1,926 Mad):

' The law that a gift of the income may under circumstances amount to a gift of the corpus may be seen for example in...'

29. All the decisions, as stated earlier, only emphasise that the intention of the parties has to be gathered from the document and other attendant circumstances having a bearing on the interpretation of the document.

30. The decision in Manno's case [1872] LR 14 Eq Cas 456 has placed some reliance on the provisions of s. 28 of the Wills Act and the impact of such a provision on a devise of rents and profits. We are not concerned with such a situation in the present case.

31. The general principles, as noted by the court below, is one which was not taken exception to even by counsel for the respondents. The question is one of application. The basic fact, however, is that in all such cases, the question was one of construction of a will or gift, as the case may be. The construction placed on Ext. A-2 by the court below, according to me, is a correct one. Even if another view is possible, that does not justify interference in second appeal. The provisions are so clear and clinching that it is difficult to conceive of a different construction,

32. In the view that I have taken it has become unnecessary to consider whether Warrington J. was justified in taking the view that an unlimited gift of the dividend would tantamount to the gift of the shares in a company. Though the right to receive dividend is a very valuable right of a shareholder, that does not exhaust his rights as the holder of shares. Very many rights, perquisites and amenities are enjoyed by a shareholder, and by a person who occupies other positions in the company by virtue of his being a shareholder, such as a director or managing director. Even as an ordinary shareholder, he has such valuable rights as to participate in a meeting of the shareholders. A right to have inspection of the documents relating to the company, a right to ensure that the affairs of the company are ordained in a proper and just manner and a right to invoke the protective provisions for a proper functioning of the company by approaching various statutory functionaries like the Inspectorate, the Registry or the Company Law Board, are also conferred on him.

33. The view that the right to dividend is not the only right pertaining to the shares in a company, appears to be substantially supported by the views expressed by Palmer's Company Law, Volume I, Twenty-second edition, page 332, Chapter 34, paragraphs 34-01 and 34-02. The rights a share carries are grouped as: (a) principal rights, (b) rights of an ancillary character, and (c) corporate and individual membership rights. It is observed :

' The principal rights which a share may carry are-

(1) The right to dividend if, while the company is a going concern, a dividend is duly declared ;

(2) the right to vote at the meetings of members ; and

(3) the right, in the winding up of the company, after the payment of the debts to receive a proportionate part of the capital or otherwise to participate in the distribution of assets of the company.

The principal duty of a shareholder, as far as the company is concerned, is to pay what is due on the share, i.e., disregarding any premium or discount, the nominal amount of the shares.

The moneys payable on the share have to be paid by the shareholder when a call for the payment is made upon him by the company, or at the dates fixed for payment by the terms of issue.'

34. Then again about the ancillary rights, the following passage occurs :

' Apart from these principal rights and duties, others of ancillary character are carried by a share, e.g., the following rights of the shareholder :

(a) to receive notice of general meetings unless the articles otherwise provide;

(b) to receive a copy of every balance-sheet (and of the documents annexed thereto) which is to be laid before the general meeting ;

(c) to receive a copy of the memorandum and the articles ;

(d) to inspect and obtain copies of the minutes of general meetings ;

(e) to inspect copies of directors' service contracts ;

(f) to inspect the various registers to be maintained by the company without charge.'

35. The author continued:

' Apart from those principal and ancillary rights which a share carries, the shareholder is further entitled to the numerous corporate and individual membership rights which the constitution of the company or the Acts themselves give him ; examples of these rights are:

(a) to petition the court for the winding up of the company ;

(b) to petition for the alternative remedy.' And the matter is summed up in the following words : ' To sum up: The holding of a share in a company limited by shares generally carries the right to receive a proportion of the profits of the company and of its assets in the winding up, and all other benefits of membership, combined with an obligation to contribute to its liabilities, all measured by a certain sum of money which is the nominal value of the share, and all subject to the memorandum and articles of the company.'

36. The rights, privileges and advantages traceable to the position as a shareholder in a corporate entity have been emphasised by the Supreme Court in *Rustom Cavasjee Cooper v. Union of India* [1970 1 40 Comp Cas 325 : AIR 1970 SC 564. Textbooks on Company Law deal at length with such rights of shareholders also. These aspects had not been placed before Warrington J. when he made the observations referred to above. With great respect to the learned judge, I venture to think that the equation made between a gift of income of indefinite duration in respect of a property on the one hand and a dividend in respect of shares on the other is not fully justified having regard to the peculiar features of a shareholding and the rights, perquisites and advantages accruing to a shareholder in a corporate entity. As I stated earlier, in the light of the conclusion already referred to, even on the basis of the observations of Warrington J., that ' it is rather a matter of construction', it is perhaps unnecessary to pursue this topic of discussion.

37. I shall now consider the contentions regarding the 33 shares. The utmost that could be said in respect of the 33 shares which originally belonged to Kamaludin is that there was no notice as regards the second plaintiff for the reason that the

notice, Ext. A-6, did not mention that it was addressed to the 1st plaintiff in her capacity as the next friend of the minor second plaintiff, and, consequently, the sale is void. Even in such a contingency, it is not as though the plaintiffs could recover the shares, ignoring the sale, and the liability due to the company in respect of which it had a lien on such shares. It is well recognised even under common law that a pawnee has a right to sell the pledge when there has been a default on the part of the pawner. The right of redemption is lost by a judicial process against the pawner for foreclosure and sale. It is open to the pawnee to proceed to sell the goods pledged after giving notice of his intention to the pawner. The option rests with the pawnee to resort to one of the two courses. The right to redeem remains until there is a lawful sale. As far as India is concerned, the Indian [Contract Act, 1872](#), contains specific provisions in this behalf. Section 176 of the Indian Contract Act provides for the rights of a pawnee when the pawner makes default in the payment of debt. Under that section, a notice is a condition precedent for a lawful sale. The right of the pawner to redeem the goods may be available even against a third person to whom the goods pledged have been transferred under an unlawful or unauthorised sale. It is in this context that the proper tender of the amount due on the pledge becomes relevant. The first of the propositions laid down by Chagla J. in *Official Assignee, Bombay v. Madholal Sindhu*, AIR 1947 Bom 217 (on which reliance had been placed by the lower appellate court also) reads:

'(i) that although the pledgee may sell the goods unauthorisedly or unlawfully, the contract of pledge is not put an end to and the pledgor does not become entitled to the possession of the goods pledged without tendering the amount due on the pledge; or, in other words, without seeking to redeem the pledge.' (emphasis *supplied)

38. If there is no proper tender of the amount due on the pledge, the only right of the pledgor in respect of an unlawful or unauthorised sale is in tort or for damages actually sustained by him. Admittedly there has not been any tender of the amount due on the pledge. If that be so, the appellants-plaintiffs cannot seek to redeem the shares in these proceedings. The lower appellate court in particular was perfectly correct in declining the relief to the plaintiffs on the ground that there has

not been any satisfaction of the conditions postulated in the aforesaid decision of the Bombay High Court. Counsel made an oral offer before me for the tender of the amount in order to redeem the shares. According to him, he had made a larger prayer for recovery of the shares, and, as such, a lesser relief by offering to redeem the shares can be granted by this court, notwithstanding the fact that hitherto there has not been any such offer to redeem the shares. I am not inclined to accept this submission. In the second appeal, this court is concerned with the question whether the judgment of the court below is vitiated by any error or by a substantial question of law. The court below observed :

'In the present case, the plaintiffs have not offered to redeem the pledge and their suit is not one for damages either.'

39. This view, taken on a proper and correct understanding of the legal principles and application thereof to the facts of the case, cannot at all be characterised as in any way erroneous. On that short ground, the contention of the appellants on this aspect is liable to be rejected.

40. There is absolutely no justice or grace in making an oral offer for redemption of the shares by tendering the amount for the first time in this court. The conduct of the plaintiffs will have a bearing while considering this request. The notices had been issued to the first plaintiff as also to the paternal grandmother of the second plaintiff. They did not take any action whatever in liquidating the liability. Even according to the first plaintiff, the notice was handed over to P.K. Mohammed. A person who was well experienced in business and connected with the company from its inception also did not think it fit to take any action for the discharge of the liability to the company. After the second plaintiff attained majority, a letter, Ext. B-23, dated November 11, 1970, was sent to the company pointing out that for the years prior to 1957, Kamaludin was receiving dividend, and requesting for copies of the share register in the name of late Kamaludin. In reply thereto, Ext. B-24 was issued by the company. The sale of the shares which stood in the name of Kamaludin was specifically referred to. It was stated :

' Since the amount due to the company was not paid by the legal heirs of late Sri Kamaludin, the company was constrained to sell the said shares in exercise of the

rights of Hen in accordance with the articles of association after giving notice to the legal heirs.

Thus, you will note that the legal heirs have no claim whatsoever in any of the shares of the company or against the company in any manner.'

41. The company offered to give copies of the share register on receipt of the requisite charge. A lawyer's notice was issued on behalf of the second plaintiff on December 9, 1970; What was alleged therein was a fraudulent relationship relating to the sale of shares held by Kamaludin. After referring to the stand of the company as disclosed in the letter, Ex. B-24, dated November 21, 1970, the lawyer's notice only stated :

' The stand taken by the company is untenable and the transfer of the shares of late P.O. Kamaluddin has not been done legally.....'

42. It is significant that no contention was taken about the absence of a notice to the second plaintiff as a legal heir. The demand made in the lawyer's notice, Ex. A-3, was for restoration of the 33 shares together with dividends and for rendition of accounts. There was no offer for the payment of the amount due to the company and the liquidation of the liability of the company for which it had a lien on the shares. The company reiterated its earlier stand by its reply, Ex. A-4, dated January 2, 1971. The plaint was filed on September 23, 1971. In the suit, the second plaintiff was, however, described as a minor and represented by his next friend, the first plaintiff. (Exs. B-23 and A-3 proceeded on the basis that the second plaintiff was a major on November 11, 1970, and December 9, 1970). There was no allegation in the plaint that the sale in respect of the 33 shares was without any due notice to the second plaintiff. The allegations in this regard are contained in paragraph 8 of the plaint. It is claimed thereunder that Ex. A-4 provoked the plaintiffs to enquire into the details relating to the sale of shares and that such enquiry revealed the receipt of the notices, Exs. A-5 and A-6. The explanation for the inaction is given thereafter in the following words :

' First plaintiff is illiterate and was able to understand their purport only after the death of P.K. Mohammed as stated above.'

43. A further allegation contained therein was that the debts in the name of Kamaludin could only be manipulations fraudulently inserted with exterior motives to defeat the plaintiffs. Despite a vague plea about the absence of notice to the second plaintiff even in the plaint, there was no tender of the amount outstanding as liability as regards his share. No offer for redemption of the shares had been made even at that stage. Nor was such an offer made even at the conclusion of the evidence or at the time of arguments before the trial court. Even when the appeal was being disposed of, such an offer was not forthcoming. It is not shadowed even in the memorandum of the second appeal. When the plea of fraud had failed miserably and when the allegation about the non-existence of the debt on the part of Kamaludin had been disproved as thoroughly unjustified by abundant documentary evidence, an offer to tender the amount at the culmination of the arguments, in the second appeal, cannot be treated as a bona fide or justified one. It must be remembered that a quarter of a century has lapsed after the sale of the shares by the company in 1957. To accede to such a request at this stage, to my mind, will result in a deflection of the course of justice. What the second plaintiff relies on is a technical plea of the absence of a notice to him, at a time when he was a minor, even when his own parent, namely, the mother and his paternal grandmother, had been intimated about the existence of the liability and the proposal of the company to sell the shares in exercise of the right of lien the company had over such shares. Such a technical plea is effectively met with a non-compliance with the condition precedent in relation to therecovery of shares on an offer to tender the amount due, in the light of the well-established principles of law- The result is that justice works itself out by declining to interfere with the judgments and decrees of the courts below.

44. A similar technical contention was urged in *F. Nanak Chand Ramkishan Dast v. Lal Chand Ganeshi Lall*, AIR 1958 Punj 222. After observing that there was some force in the contention based on Section 176 of the Indian [Contract Act, 1872](#), the High Court observed (at p. 227):

'.....but it is no use pursuing the matter any further in the present case.

The defendants have not been able to prove the loss they have suffered on account of want of notice.'

45. The dismissal of the suit by the courts below was in that view upheld.

46. In view of my aforesaid conclusion, it is not necessary to consider the correctness of the propositions laid down in Official Assignee's case, AIR 1947 Bom 217, referred to above. Counsel for the respondents pointed out that the decision of the Bombay High Court had been reversed by the Federal Court (vide *Madholal Sindhu of Bombay v. Official Assignee of Bombay*, AIR 1950 FC 21). Their Lordships observed as follows as regards the contention based on the sale of the shares being ab initio void on the ground of no notice of sale having been given (at p. 38):

' This contention overlooks the fact that the pledgee before disposal of the shares had consulted the pledger who was agreeable to the transfer of these shares by the bank. His consent having been obtained for the disposal of the shares, the question of notice under Section 176 does not arise. Moreover, he was subsequently informed about it and throughout he ratified the transaction and acquiesced in it.'

47. The facts in the present case are different from those in the Bombay decision on material aspects. Section 176 of the Indian [Contract Act, 1872](#), is a general provision. It applies to the generality of goods. The [Companies Act, 1956](#), is a special enactment. The shares of a company, though would answer the term ' goods ' coming under the Indian [Contract Act, 1872](#), are dealt with, specifically and specially under diverse provisions of the Companies Act. A company has been conferred by Parliament certain specific rights in relation to the shares. This is the effect of Section 28 of the [Companies Act, 1956](#), and the memorandum and articles of association of the company. The transaction between a shareholder of a company and the company in respect of the dealings relating to the shares are thus covered by a special enactment, which also appears to be a later enactment vis-a-vis the Contract Act. It would, therefore, appear that that in relation to the dealings in such shares, whether in respect of transfers or transmissions or in respect of the sales to the exercise of the lien, the provisions of the [Companies](#)

[Act, 1956](#), and those in the memorandum and articles of association of the company framed under Section 28 thereof should govern the matter. If that be so, it is clear from the provisions of Ex. B-8 (vide Article 12) that any irregularity in the sale will not vitiate the same. I am inclined to take the view that the proceedings in relation to the exercise of a lien of a company over its shares should be governed by the provisions of the Companies Act and the memorandum and articles of association and should not be controlled by, the general provisions of the Indian [Contract Act, 1872](#). . In that view of the matter also, Section 176 would be excluded from the present case. If that be so, Ex. B-8 would hold the field and the sale of the shares would not be open to challenge in view of the express provision contained in Article 12 reading :

' The purchaser shall be registered as the holder of the shares thus sold and he shall not be bound to see to the application of the purchase money nor shall his title to the shares so purchased by him be affected by any irregularity or invalidity in the proceedings in reference to the sale.'

48. For yet another reason, Section 176 of the Indian [Contract Act, 1872](#), may have no application to the facts of the case. Section 176 applies to a pawn or pledge. That term is denned in the Indian [Contract Act, 1872](#), in the following terms :

' The bailment of goods as security for payment of debt or performance of a promise is called ' pledge '. ' (vide Section 172)

49. In the present case, there has not been any delivery of the goods, namely, the shares, and consequently there has not been any bailment as regards the goods, and a fortiori, any pawn or pledge. That being so, Section 176, on which reliance has been placed by the second plaintiff, cannot be of any avail to him.

50. A cross-appeal has been filed on behalf of respondent No. 1. The finding of the court below about the invalidity of the sale on the ground of lack of notice is challenged therein. The court below has sought to make a distinction between a private sale and a court sale. As regards the latter, the decisions of the Supreme Court in N.K. Mohd. Sulaiman Sahib v. N.C. Mohd. Ismail Saheb, AIR 1966 SC

792, and Harihar Prasad Singh v. Balmiki Prasad Singh, AIR 1975 SC 733, and other decisions have taken the view that when there is a substantial representation and when no prejudice is caused to the minor by the non-issue of separate notice, the absence of such notice would not be fatal to the sale. This contention was rejected by the court below with the following observation:

'...the decisions referred to are all in respect of court sales and decrees and cannot have direct bearing to a private sale by the company in the exercise of its right of lien.'

51. This reasoning of the court below may be open to serious doubt, for, a sale by a company of the shares in exercise of its lien created under the articles of association framed under the [Companies Act, 1956](#), cannot, with justification, be equated to a private sale. A sale by a company, by virtue of the statutory provisions, has many attributes of a court sale. The sale is not done in a secret manner. The affairs of a company could be effectively scrutinised by a shareholder or by successors-in-interest of a deceased shareholder. The details relating to the shareholding can be known by approach to the company or to the statutory authorities. The action of the company is subject to various statutory controls. In the background, a sale by a company in the exercise of its lien and in accordance with the provisions contained in the articles of association cannot be equated to a private sale. In that view of the matter, the doctrine of substantial representation and the absence of prejudice applicable to court sales may have application to the sale by a company also. It is, however, unnecessary to express any final view on that aspect in this case in view of my earlier conclusion that the second appeal is liable to be dismissed even otherwise.

52. In the result, the second appeal fails and it is dismissed but without any order as to costs.