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Dec. 9.

SHA MULCHAND & CO. LTD. (IN LIQUIDATION)

v.

JAWAHAR MILLS LTD.

[MEHR CHAND MAHAJAN, DAS, VIVIAN BOSE and GHULAM HASAN JJ.]

Company—Forfeiture of shares—Necessity of due notice—Application by shareholder to rectify register—Long delay—Acquiescence, waiver and laches—Abandonment of right to question validity of forfeiture—Application for rectification of register—Limitation—Limitation Act, 1908, Arts. 48, 49, 120, 181, applicability of—Companies Act, 1913, ss. 38, 247.

A private limited company of which G and S were the only two members owned 5,000 shares in a Mill. The company did not pay the calls and the 5,000 shares held by them were forfeited on the 5th September, 1941, and re-allotted to other persons on the 16th November. Notice of the forfeiture was sent to the company on the 10th September but this was returned undelivered. In the meantime the company was struck off the Register under s. 247 of the Companies Act with effect from 9th September. On the application of S the company was restored to the Register and an Official Receiver was appointed on 16th February, 1945, to wind it up. On the 5th March, 1946, the Official Receiver took out a summons calling upon all parties to show cause why the share register of the Mills should not be rectified by restoring the name of the company to the register in respect of the 5,000 shares, as the forfeiture thereof was invalid. The trial Judge held that the forfeiture was invalid for want of sufficient notice, that the plea of estoppel, acquiescence and laches raised by the Mills was untenable, and that the application was governed by Art. 120 of the Limitation Act and was not time-barred, and ordered that, as the advocates had agreed to such a course, 5,000 new shares may be issued to the company. The High Court on appeal found that the forfeiture was invalid, that the application was not time-barred and that no acquiescence, waiver or estoppel had been established, but held that the company had, by the conduct of G and S and the long delay in reviving the company, abandoned its right to challenge the forfeiture and that there was also no legal basis on which the order passed by the trial Judge could be supported. On further appeal:

Held, (i) if the facts on record were insufficient to sustain a plea of waiver, acquiescence or estoppel as held by both the lower Courts, a plea of abandonment of right which is an aggravated form of waiver, acquiescence or laches and akin to estoppel cannot be sustained on the same facts.

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(ii) Whatever be the effect of mere waiver, acquiescence or laches on the part of a person on his claim to equitable remedy to enforce his rights under an executory contract, mere waiver, acquiescence or laches which does not amount to an abandonment of his right or to an estoppel against him, cannot disentitle that person from claiming relief in equity in respect of his executed interests.

Prendergast v. *Turton* ([1841] 62 E.R. 807), *Clarke and Chapman* v. *Hart* ([1858] 6 H.L.C. 632), *Jones* v. *North Vancouver Land and Improvement Co.* ([1910] A.C. 317) explained. *Garden Gully United Quartz Mining Company* v. *Hugh Mclister* ([1875] 1 App. Cas. 39) relied on.

(iii) There was no evidence in the case of any conduct on the part of S or G subsequent to the date of forfeiture and anterior to the Mills changing its position to its detriment, upon which a plea of abandonment of the right to challenge the forfeiture could be based.

Smith, Stone and Knight v. *Birmingham Corporation* ([1939] 4 All E.R. 116) distinguished.

(iv) On a proper construction of the statements made by the counsel, the form of the order to which the counsel had agreed could not be challenged by the Mills.

(v) The application was not governed by Arts. 48 or 49 of the Limitation Act as a claim for rectification of the register simpliciter does not necessarily involve a claim for the return of the share scrips and there was no prayer in the case for return of the scrips.

(vi) Article 181 applies only to applications under the Civil Procedure Code, and even if the said article was applicable, time began to run under the article only from the date on which the company knew of the forfeiture of the shares; and as the company had no knowledge until 9th September, 1941, when it became defunct, and the company came to life again only on 16th February, 1945, knowledge could not be imputed to the company before the latter date and the application was therefore not barred under Art. 181.

(vii) If Art. 181 does not apply the only article that could apply was Art. 120 and even under that article the application was not barred.

Hansraj Gupta v. *Official Liquidators, Dehra Dun, Mussoorie Electric Tramway Co.* ([1933] 60 I.A. 13), *Hurdutrai Jagdish Prasad* v. *Official Assignee of Calcutta* ([1948] 52 C.W.N. 343) approved. *Asmatali Sharif* v. *Mujahar Ali Sardar* ([1948] 52 C.W.N. 64) and *Sarvamangal Dasi* v. *Paritosh Kumar Das* (A.I.R. 1952 Cal. 689) doubted.

BOSE J.—Waiver and abandonment are in their primary context unilateral acts and except where statutory or other limitations intervene unilateral acts in themselves cannot effect a change in legal status. Consequently it is fundamental that

abandonment and waiver cannot unilaterally bring about a change in legal status in the absence of either a statutory mandate or an act of acceptance, express or implied by another person.

There is also a fundamental difference between executed and executory interests in this connection. A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by *mere* laches, or *mere* standing by or even by saying that he has abandoned his right, unless there is something more, namely inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is to say, unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver *as such* which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, that is to say, which prevents him from asserting that the legal forms which in law bring about the extinguishment of his interest and pass the title which resides in him to another, were not duly observed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3 of 1951. Appeal from the Judgment and Order dated March 11, 1949, of the High Court of Judicature at Madras (Satyanarayana Rao and Viswanatha Sastri JJ.) in Original Side Appeal No. 3 of 1947, arising out of the Judgment and Order dated November 15, 1946, of Clark J. and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 599 of 1946.

M. C. Setalvad (Attorney-General for India) (A. Balasubramanian, with him) for the appellant.

N. Raja Gopala Iyengar for the respondent.

1952. December 9. The Judgment of Mehr Chand Mahajan, Das and Ghulam Hasan JJ. was delivered by Das J. Vivian Bose J. delivered a separate Judgment.

DAS J.—This appeal arises out of an application made by the Official Receiver representing Sha Mulchand & Company Ltd. (in liquidation) under section 38 of the Indian Companies Act for rectification of the register of the Jawahar Mills Ltd.

Sha Mulchand & Company Ltd. (hereinafter referred to as "the Company") was incorporated in

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1937 as a private limited company. At all material times it consisted of two members, T. V. T. Govindaraju Chettiar and K. N. Sundara Ayyar. The Jawahar Mills Ltd. (hereinafter called "the Mills") was also incorporated in 1937 with an authorised capital of Rs. 10,00,000 divided into one lac shares of Rs. 10 each. The Company was the managing agent of the Mills from its inception and applied for and was allotted 5,000 ten-rupee shares Nos. 15048 to 20047 on which Rs. 5 per share had been paid. The Company continued to act as the managing agent of the Mills till the 30th June, 1939, on which date it resigned the managing agency. Prior to the Company's resignation the two members of the Company had entered into an agreement with one M. A. Palaniappa Chettiar, a partner of the incoming managing agency firm, upon certain terms which need not be referred to in greater detail.

Within two months after the change of managing agents, the Mills made two calls, namely, one on the 22nd August, 1939, for Rs. 2 per share payable on the 1st October, 1939, and the other on the 1st October, 1939, for Rs. 3 payable on the 1st December, 1939. The Company did not pay either of the calls. On the 23rd January, 1940, Govindaraju Chettiar was adjudged insolvent on the application of Sundara Ayyar. This insolvency of Govindaraju Chettiar was eventually annulled in 1944. During this period Govindaraju Chettiar, in law, ceased to be a director of the Company, although it is alleged that he nevertheless continued to take part in the management of the Company.

By a resolution of the Board of Directors of the Mills passed on the 12th August, 1940, the new managing agents were empowered to give notices to such persons as had not paid the allotment money and the call money within the date fixed and to intimate them that in default their shares would be forfeited. A notice was issued on the 16th September, 1940, and two copies thereof are said to have been sent to Sundara Ayyar and Govindaraju Chettiar.

No payment having been made, the 5,000 shares held by the Company were forfeited by a resolution of the Board of Directors of the Mills. The auditor of the Mills having pointed out that the purported forfeiture was irregular and illegal, this forfeiture was cancelled.

By a resolution passed by circulation on the 25th February, 1941, the Board of Directors of the Mills resolved that a notice be sent to the Company informing it that it was in arrears with calls to the extent of Rs. 25,000, that the amount must be paid on or before the 31st March, 1941, and that, in default, its shares would be forfeited. A notice dated the 15th March, 1941, was accordingly addressed to the Company and sent by registered post with acknowledgment due. It appears that the notice was actually posted on the 17th March, 1941, and was received by Govindaraju Chettiar on the 20th March, 1941. The Company did not pay the arrears of calls. On the 5th September, 1941, the Board of Directors of the Mills resolved that "the 5,000 shares Nos. 15048—20047 standing in the name of the Company have been forfeited." On the 10th September, 1941, the Mills wrote a letter to the Company informing the latter that the Directors of the Mills had at their meeting held on the 5th September, 1941, forfeited the 5,000 shares. There is no dispute that this letter which was sent by registered post was returned undelivered. On the 1st October, 1941, an entry was made in the share ledger of the Mills recording that the 5,000 shares of the Company had been forfeited. On the 16th November, 1941, these 5,000 shares were reallotted to 14 different persons and on the 17th November, 1941, a letter was sent to the Company intimating that the forfeited shares had been reallotted and calling upon the Company to send back to the Mills all the documents relating to the original allotment of the 5,000 shares to the Company. In the meantime on the 26th August, 1941, by an order made by the Registrar of Joint Stock Companies the Company was struck off the register of companies under section 247

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of the Indian Companies Act. This order of the Registrar was published in the Official Gazette on the 9th September, 1941, *i.e.*, four days after the shares were forfeited and one day before the notice intimating the fact of forfeiture was sent in a registered cover which was, however, returned undelivered. Under section 247 (5) of the Indian Companies Act the Company stood dissolved on and from the date of such publication.

The Mills having come to know of the dissolution of the Company applied to the High Court (O.P. No. 10 of 1942) praying that the name of the Company be restored to the register of companies and that after such restoration was duly advertised the Company be wound up by the Court. A similar application was made on the 11th December, 1941, by the Income-tax authorities (O.P. No. 11 of 1942). On the 23rd February, 1942, Sundara Ayyar filed an affidavit contending, amongst other things that the Directors of the Mills had no power to forfeit the shares. On the 2nd April, 1942, however, O.P. No. 10 of 1942 was compromised, and the Mills received Rs. 11,000 from Sundara Ayyar in full satisfaction of their claim against the Company. On the 25th June, 1942, O.P. No. 11 of 1942 was also compromised and Sundara Ayyar paid up the claim of the Income-tax authorities. The two petitions for restoration of the Company were accordingly dropped.

On the 27th June, 1942, Sundara Ayyar filed a suit against the Mills and others including Palaniappa Chettiar claiming a declaration that the forfeiture by the Mills of the 5,000 shares was illegal and inoperative and directing the Mills to pay to the plaintiff and the third defendant representing the estate of Govindaraju Chettiar the value of the forfeited shares with dividend or interest thereon and directing Palaniappa Chettiar to pay the plaintiff and the third defendant the sum of Rs. 25,000. This suit was dismissed on the 17th November, 1943, on the ground that Sundara Ayyar, who was only a member of the dissolved Company, had no *locus standi* and could

have no relief personally. Sundara Ayyar filed an appeal therefrom which was dismissed as against the Mills but the case was remanded to the trial Court for the trial of his claim as against the fourth defendant, Palaniappa Chettiar.

During the pendency of Sundara Ayyar's appeal he on the 12th August, 1944, filed O.P. No. 199 of 1944 for the restoration of the Company. On that application an order was made on the 16th February, 1945, that the name of the Company be restored to the register of companies, that the Company be deemed to have continued in existence as if its name had never been struck off, that such restoration be advertised and that the Company be wound up by the Court and the Official Receiver do forthwith take charge of the assets and liabilities of the Company. It was further ordered that the Official Receiver do recognise that as between the Mills and the Company, the Mills should be regarded as having been duly paid only Rs. 11,000 out of the total debt of Rs. 25,550 due to the Mills. By an order made on the 21st January, 1946, leave was given to the Official Receiver to take appropriate steps regarding the 5,000 shares purported to have been forfeited by the Mills. Accordingly on the 5th March, 1946, the Official Receiver, in the name of the Company, took out the present summons calling upon all parties concerned to show cause why the share register of the Mills should not be rectified by restoring the name of the Company to the said register in respect of 5,000 shares numbering 15048-20047 and why such other alternative or consequential relief should not be granted to the applicant as might be just and necessary in the circumstances of the case.

The Mills contended, in opposition to that application, that the shares had been properly forfeited, that the Company was, on the principles of estoppel, acquiescence and laches, precluded from challenging the forfeiture, that the application was barred by limitation and that the shares having already been allotted to other persons, who had not been made

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parties to the application, no order for rectification of the register in respect of those shares could be made.

The summons came up for hearing before Mr. Justice Clark. The learned Judge, by his judgment dated the 15th November, 1946, held that the notice dated the 15th March, 1941, which was posted on the 17th March, 1941, and delivered on the 20th March, 1941, and on which the resolution of forfeiture passed on the 5th September, 1941, was founded, was not in conformity with the provisions of articles 29 and 30 of the articles of association of the Company which required 14 clear days' notice. The learned Judge further held that the plea of estoppel, acquiescence and laches was untenable, that article 49 of the Limitation Act did not apply either expressly or by way of analogy to the present application and that article 120, which prescribed a period of six years from the date when the right to sue accrued, would, by analogy, apply to the present proceedings and that so applied the present proceedings must be held to be within time. Having disposed of the controversy on the above points it remained to consider the form of the order which could properly be made on the application. It is quite clear that the specific shares having already been allotted to 14 different persons and those persons not being then before the Court, the Court could not then and there direct rectification of the register by restoring the name of the Company to the share register of the Mills in respect of those identical shares. There was nevertheless nothing to prevent the Court even at that stage to give notice of the application to the persons to whom the shares had been reallotted and/or those who were holding the shares at the time and after thus adding them as parties thereto to make the appropriate order of rectification and, if thought fit, to also award damages to the Company. There were, however, 16,000 shares of Rs. 10 each yet unissued. After discussing the matter with learned advocates on both sides to which discussion a reference will be made hereafter the

learned Judge, in the belief that the advocates for the parties had agreed as to the form of the order, directed that the Mills do rectify their register by inserting the name of the applicant Company as owner of 5,000 shares out of the unissued shares of Rs. 10 each and that on such insertion the Company do on or before the 15th January, 1947, pay to the Mills Rs. 25,000, being the amount of calls in arrears.

Pursuant to further directions given by the learned Judge on the 7th January, 1947, the Mills on the 10th January, 1947, received Rs. 25,000 and allotted 5,000 shares. Although the Mills thus acted upon the order they, nevertheless, on the 6th February, 1947, filed an appeal against the order. That appeal came up for hearing before a Bench consisting of Satyanarayana Rao and Viswanatha Sastri JJ. It was not disputed before the appeal Court that the forfeiture was invalid, but the contentions urged were that by reason of the irregularity the forfeiture was only voidable and not void and that as the forfeiture was only voidable it was open to the Company to waive or abandon its right to dispute the validity of the forfeiture and that in fact, by its conduct, it had done so, that the claim to rectify the register was barred by limitation and that in any event rectification was impossible because the shares were not available in specie, the same having been reallotted to other persons. The learned Judges by their judgment dated the 11th March, 1949, held that the forfeiture was invalid, that the application was not barred by limitation, for it was covered by article 120 of the Limitation Act. The learned Judges recognised that where a period of limitation was prescribed for a suit or a proceeding mere delay was no bar unless it was of such a character as would lead to an inference of abandonment of the right or unless it was established that the person against whom the action or proceeding was instituted was actually prejudiced by reason of such delay. The learned Judges agreed with the

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trial Court that no plea of acquiescence, waiver or estoppel had been established in the present case. The learned Judges, nevertheless, thought that the question of abandonment of the right and prejudice to the appellant by reason of the delay stood on a different footing. Then after referring to certain conduct on the part of Govindaraju Chettiar and Sundara Ayyar the learned Judges concluded that by reason of the long delay in reviving the Company and in taking proceedings under section 38 of the Indian Companies Act the Mills had been induced to put themselves in a situation in which it became impossible for them to restore the Company to the register in respect of those 5,000 shares and that in view of this conduct, if the applicants were Govindaraju Chettiar and Sundara Ayyar, it would have been a case in which relief would have been refused in the light of the principles which the learned Judges deduced from the judicial decisions referred to by them. Then referring to the decision in *Smith, Stone & Knight* v. *Birmingham Corporation* (1) and certain text books the learned Judges took the view that it was too late in the day to adhere to the strict formalism laid down in *Salomon's* case (2) and that as the tendency of modern decisions was to lift the veil of corporate personality and disregard the corporate form, the conduct of its only two members had disentitled the company from claiming the relief of rectification. The learned Judges further held that there was no legal basis on which the form of the order could be supported. On reading the judgment of the trial Judge and after hearing the senior advocate appearing for the Mills the learned Judges felt unable to agree that the learned advocate had agreed to the substitution of the 5,000 out of the unissued shares for the 5,000 forfeited shares. The result was that the appeal was allowed and the order of the trial Judge was set aside. The Company by its Official Receiver has now come up before this Court with leave granted by the High Court

(1) (1939) 4 All E. R. 116. (2) [1897] A. C. 22.

under sections 109 and 110 of the Code of Civil Procedure.

The appeal Court, it will be observed, reversed the decision of the trial Judge and decided the appeal against the Company on two grounds only, namely, (1) that the Company had by the conduct of its two members abandoned its right to challenge the forfeiture, and (2) that the form of the order could not be supported as one validly made under section 38 of the Indian Companies Act. The learned Attorney-General, appearing in support of this appeal, has assailed the soundness of both these grounds. The learned Attorney-General contends, not without considerable force, that having, in agreement with the trial Court, held that no plea of acquiescence, waiver or estoppel had been established in this case, the appeal Court should not have allowed the Mills to raise the question of abandonment of right by the Company, inasmuch as no such plea of abandonment had been raised either in the Mills' affidavit in opposition to the Company's application or in the Mills' grounds of appeal before the High Court. Apart from this, the appeal Court permitted the Mills to make out a plea of abandonment of right by the Company as distinct from the pleas of waiver, acquiescence and estoppel and sought to derive support for this new plea from the well known cases of *Prendergast* v. *Turton*(1), *Clark & Chapman* v. *Hart*(2) and *Jones* v. *North Vancouver Land and Improvement Co.*(3). A perusal of the relevant facts set out in the several reports and the respective judgments in the above cases will clearly indicate that apart from the fact that some of them related to collieries which were treated on a special footing, those cases were really cases relating to waiver or acquiescence or estoppel. Indeed in *Clarke's* case (2) while Lord Chelmsford referred to the decision in *Prendergast's* case (1) as a case of abandonment of right, Lord Wensleydale read it as an instance of acquiescence and estoppel. Unilateral act or conduct of a person,

(1) 62 E.R. 807.
(2) 6 H.L.C. 632; 10 E.R. 1443.
(3) [1910] A.C. 317.

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that is to say act or conduct of one person which is not relied upon by another person to his detriment, is nothing more than mere waiver, acquiescence or laches, while act or conduct of a person amounting to an abandonment of his right and inducing another person to change his position to his detriment certainly raises the bar of estoppel. Therefore, it is not intelligible how, having held that no plea of waiver, acquiescence or estoppel had been established in this case, the appeal Court could, nevertheless, proceed to give relief to the Mills on the plea of abandonment by the Company of its rights. If the facts on record were not sufficient to sustain the plea of waiver, acquiescence or estoppel, as held by both the Courts, we are unable to see how a plea of abandonment of right which is an aggravated form of waiver, acquiescence or laches and akin to estoppel could be sustained on the self-same facts. Further, whatever be the effect of mere waiver, acquiescence or laches on the part of a person on his claim to equitable remedy to enforce his rights under an executory contract, it is quite clear, on the authorities, that mere waiver, acquiescence or laches which does not amount to an abandonment of his right or to an estoppel against him cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory interest. See per Lord Chelmsford in *Clarke's* case (1) at page 657. Indeed, it has been held in *The Garden Gully United Quartz Mining Company* v. *Hugh McLister*(2) that mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. Sir Barnes Peacock in delivering the judgment of the Privy Council observed at pages 56-57 as follows:—

"There is no evidence sufficient to induce their Lordships to hold that the conduct of the plaintiff did amount to an abandonment of his shares, or of his interest therein, or estop him from averring that he continued to be the proprietor of them. There certainly is no evidence to justify such a conclusion

(1) 6 H.L.C. 632 : 10 E.R. 1443. (2) L.R. 1 App. Cas. 39.

with regard to his conduct subsequent to the advertisement of the 30th of May, 1869. In this case, as in that of *Prendergast* v. *Turton*(1), the plaintiff's interest was executed. In other words, he had a legal interest in his shares and did not require a declaration of trust or the assistance of a Court of Equity to create in him an interest in them. Mere laches would not, therefore, disentitle him to equitable relief: *Clarke and Chapman* v. *Hart*(2). It was upon the ground of abandonment, and not upon that of mere laches, that *Prendergast* v. *Turton*(1) was decided."

Two things are thus clear, namely, (1) that abandonment of right is much more than mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself, and (2) that mere waiver, acquiescence or laches which is short of abandonment of right or estoppel does not disentitle the holder of shares who has a vested interest in the shares from challenging the validity of the purported forfeiture of those shares. In view of the decision of the Courts below that no case of waiver, acquiescence, laches or estoppel has been established in this case it is impossible to hold that the principles deducible from the judicial decisions relied upon by the appeal Court have disentitled the Company to relief in this case. The matter does not rest even here. Assuming, but not conceding, that the principle of piercing the veil of corporate personality referred to in *Smith, Stone & Knight* v. *The Birmingham Corporation* (3) can at all be applied to the facts of the present case so as to enable the Court to impute the acts or conduct of Govindaraju Chettiar and Sundara Ayyar to the Company, we have yet to inquire whether those acts or conduct do establish such abandonment of rights as would, according to the decisions, disentitle the plaintiff from questioning the validity of the purported declaration of forfeiture. There can be no question that the abandonment, if any, must be inferred from acts or conduct of the Company as such or, on the above principles, of its two members subsequent to

(1) 62 E.R. 807.
(2) 6 H.L.C. 632 : 10 E.R. 1443.
(3) (1939) 4 All E.R. 116.

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the date of the forfeiture, for it is the right to challenge the forfeiture that is said to have been abandoned. In order to give rise to an estoppel against the Company, such acts or conduct amounting to abandonment must be anterior to the Mills' changing its position to its detriment. The resolution for forfeiture was passed on the 5th September, 1941. The five thousand forfeited shares were allotted to 14 persons on the 16th November, 1941, and it is such allotment that made it impossible for the Mills to give them back to the Company. In order, therefore, to sustain a plea of abandonment of right or estoppel, it must be shown that the Company or either of its two members had done some act and/or had been guilty of some conduct between the 5th September, 1941, and the 16th November, 1941. No such act or conduct during such period has been or can be pointed out. On being pressed advocate for the Mills refers us to the conduct of Sundara Ayyar in opposing O.P. No. 10 of 1942 filed by the Mills and O.P. No. 11 of 1942 by the Income-tax authorities for restoring the Company to the register of companies and it is submitted that such conduct indicates that Sundara Ayyar had accepted the validity of the forfeiture. This was long after the Mills had reallotted the forfeited shares. Further, a perusal of paragraph 9 of the affidavit in opposition filed by Sundara Ayyar in O.P. No. 10 of 1942 will clearly show that he not only did not accept the forfeiture as valid but actually repudiated such forfeiture as wholly beyond the competence of the Board of Directors of the Mills. The reason for opposing the restoration of the Company may well have been that Sundara Ayyar desired, at all cost, to avoid his eventual personal liability as a shareholder and director of the Company. In any case, Sundara Ayyar did make it clear that he challenged the validity of the purported forfeiture of shares by the Mills and in this respect this case falls clearly within the decision in *Clarke's* case (1) relied upon by the appeal Court. The only other conduct of Sundara Ayyar relied on by learned advocate for the Mills in

(1) 6 H.L.C. 632; 10 E.R. 1443.

support of the appeal Court's decision on this point is that Sundara Ayyar proceeded with his suit against Palaniappa Chettiar even after his suit as well as his appeal had been dismissed as against the Mills. In that suit Sundara Ayyar sued the Mills as well as Govindaraju Chettiar and the Official Receiver of Salem representing the latter's estate and Palaniappa Chettiar. In the plaint itself the validity of the forfeiture was challenged. The claim against Palaniappa Chettiar was in the alternative and it was founded on the agreement of the 30th June, 1939. The suit was dismissed as against the Mills only on the technical ground that Sundara Ayyar had no *locus standi* to maintain the suit. The contention of the Company that the forfeiture was invalid and the claim for rectification of the share register of the Mills by restoring the name of the Company cannot possibly have been affected by this decision. Sundara Ayyar's claim against Palaniappa Chettiar was based on the agreement of 1939 and it was formulated as an alternative personal claim. In view of the clear allegation in the plaint that the forfeiture was invalid and not binding on the Company, the continuation of the suit by Sundara Ayyar to enforce his personal claim against Palaniappa Chettiar cannot be regarded as an abandonment by Sundara Ayyar of the right of the Company. It must not be overlooked that the Company stood dissolved on that date and Sundara Ayyar had no authority to do anything on behalf of the Company. In our opinion there is no evidence of abandonment of the Company's right to challenge the validity of the purported forfeiture.

The second point on which the appeal Court decided the appeal against the Company was that the form of the order made by the trial Court could not be supported as one validly made under section 38 of the Indian Companies Act. It will be recalled that having disposed of all the points of controversy against the Mills and in favour of the Company the trial Judge had to consider the form of the order which could properly be made in favour of the

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The second point on which the appeal Court decided the appeal against the Company was that the form of the order made by the trial Court could not be supported as one validly made under section 38 of the Indian Companies Act. It will be recalled that having disposed of all the points of controversy against the Mills and in favour of the Company the trial Judge had to consider the form of the order which could properly be made in favour of the

reasonable suggestion . . . . . I direct accordingly that on insertion of the name of the applicant Company as owner of 5,000 of the unissued shares the applicant Company shall pay to the respondent company only Rs. 25,000 being the amount of calls in arrears."

The appeal Court, however, went behind this record of the proceedings that took place before the trial Court and heard the learned senior advocate as to what had happened in Court and after hearing the senior advocate for the Mills found itself unable to agree with the contention that the learned advocate for the Mills had agreed to the substitution of 5,000 unissued shares for the shares forfeited. No affidavit of the learned senior advocate was filed before the trial Court for the rectification of what is now alleged to have been wrongly recorded by the trial Judge, as suggested by the Privy Council in *Madhu Sudan Chowdhri* v. *Musammat Chandrabati Chowdhrain* (1) and other cases referred to in *Timmalapalli Virabhadra Rao* v. *Sokalchand Chunilal & Others* (2). While we do not consider it necessary or desirable to lay down any hard and fast rule, we certainly take the view that the course suggested by the Privy Council should ordinarily be taken. It appears that at the time when the application was made for leave to appeal to the Federal Court an affidavit sworn by G. Vasantha Pai, the junior advocate for the Mills, was filed before the Court dealing with that application. Paragraph 5 of that affidavit runs as follows:—

"During the trial every question was argued on behalf of the respondent company and no point was given up. This will be clear from the fact that till we reached the penultimate paragraph of the judgment beginning 'It now remains to consider, etc.' all the issues are dealt with by the learned Judge. The agreement was on the specific form of the order on the basis of his Lordship's judgment and without prejudice to the respondent company's rights. What

(1) (1917) 21 C. W. N. 897. (2) (1951) 1 M. L. J. 244.

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was agreed to was "proper order" on the basis of his Lordship's judgment which by then had been dictated. The respondent company no more consented to the order than the appellant consented to have his application dismissed when its counsel agreed that it was impossible to make an order in terms of the Judge's summons."

The appeal Court understood the stand taken by the learned senior advocate as follows:—

"He seems to have agreed only as an alternative that if all his contentions were overruled and the learned Judge thought that notwithstanding the difficulty in the way of granting the relief for rectification the applicant company should be restored to the register, the only shares available being the 16,000 shares of Rs. 10 each unissued, the applicant company could be recognised as a shareholder in respect of 5,000 out of those shares....."

It is quite clear from the judgment of the trial Court, paragraph 5 of the junior advocate's affidavit and the statement of the learned senior advocate as recorded by the appeal Court that the agreement was solely and simply as to the specific form of the order, without prejudice to the Mills' right to challenge the correctness of the findings of the trial Court on the material issues. In other words, all that learned advocate for the Mills desired to guard himself against was that the agreement should not preclude the Mills from preferring an appeal against the decision of the learned Judge on the merits. The reservation was as to the right of appeal challenging the findings on the merits and the agreement was only as to the form of the order. This limited agreement certainly implied that the Mills agreed to be bound by the order only if the Mills failed in their appeal on the merits. In short, the consent covered only the form of the order and nothing else so that if the Mills succeeded in their appeal the order would go, although advocate had agreed to its form but that if the Mills failed in their contention as to the correctness of the findings of the learned trial Court on the

different questions on merits it would no longer be open to them to challenge the order only on the ground of the form of the order. In our judgment the Mills cannot attack the form of the order to which their counsel consented.

Learned advocate for the Mills has raised the question of limitation. He referred us to articles 48 and 49 of the Limitation Act but did not strongly press his objection founded on those articles. We agree with the trial Court and the Court of appeal that those two articles have no application to this case. A claim for the rectification of the register simpliciter does not necessarily involve a claim for the return of the share scrips and in this case there was, in fact, no prayer for the return of shares or the scrips and, therefore, these two articles can have no application. Learned advocate, however, strongly relies on article 181 of the Limitation Act. That article has, in a long series of decisions of most, if not all, of the High Courts, been held to govern only applications under the Code of Civil Procedure. It may be that there may be divergence of opinion even within the same High Court but the preponderating view undoubtedly is that the article applies only to applications under the Code. The following extract from the judgment of the Judicial Committee in *Hansraj Gupta* v. *Official Liquidators, Dehra Dun Mussoorie Electric Tramway Company Limited* (1) is apposite:—

"It is common ground that the only article in that schedule which could apply to such an application is article 181: but a series of authorities commencing with *Rai Manekbai* v. *Manekji Kavasji* (2) have taken the view that article 181 only relates to applications under the Code of Civil Procedure, in which case no period of limitation has been prescribed for the application. But even if article 181 does apply to it, the period of limitation prescribed by that article is three years from the time when the right to apply accrued, which time would be not earlier than the

(1) (1933) 60 I.A. 13 at p. 20. (2) (1883) 7 Bom. 213.

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date of the winding up order, March 26, 1926. The application of the liquidators was made on March 26, 1928, well within the three years. The result is that from either point of view the application by the liquidators, if otherwise properly made under and within the provisions of section 186 of the Indian Companies Act, is not one which must be dismissed by reason of section 3 of the Indian Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed. The case may be a *casus omissus*. If it be so, then it is for others than their Lordships to remedy the defect."

Learned advocate for the Mills, however, points out that the reason for holding that article 181 was confined to applications under the Code was that the article should be construed *ejusdem generis* and that, as all the articles in the third division of the schedule to the Limitation Act related to applications under the Code, article 181, which was the residuary article, must be limited to applications under the Code. That reasoning, it is pointed out, is no longer applicable because of the amendment of the Limitation Act by the introduction of the present articles 158 and 178. These articles are in the third division which governs applications but they do not relate to applications under the Code but to one under the Arbitration Act and, therefore, the old reasoning can no longer hold good. It is urged that it was precisely in view of this altered circumstance that in *Asmatali Sharif* v. *Mujahar Ali Sardar*(1) a Special Bench of the Calcutta High Court expressed the opinion that an application for pre-emption by a non-notified co-sharer should be governed by article 181 of the Limitation Act. A perusal of that case, however, will show that the Special Bench did not finally decide that question in that case. In *Hurdutrai Jagadish Prasad* v. *Official Assignee of Calcutta*(2) a Division Bench of the Calcutta High Court consisting of Chief Justice Harries and Mr. Justice Mukherjea who had delivered

(1) (1948) 52 C.W.N. 64. (2) (1948) 52 C.W.N. 343.

the judgment of the Special Bench clearly expressed the view that article 181 of the Limitation Act applied only to applications under the Civil Procedure Code and did not apply to an application under section 56 of the Presidency Towns Insolvency Act. Mukherjea J. who also delivered the judgment of the Division Bench explained the observations made by him in the Special Bench case by pointing out that the entire procedure for an application under section 26 (F) of the Bengal Tenancy Act was regulated by the Civil Procedure Code and, therefore, an application for pre-emption was, as it were, an application made under the Civil Procedure Code. Subsequently in *Sarvamangala Dasi* v. *Paritosh Kumar Das*(1) G. N. Das J. who was also a member of the Special Bench in the first mentioned case expressed the opinion, while sitting singly, that article 181 was not confined to applications under the Code. His Lordship's attention does not appear to have been drawn to the case of *Hurdutrai Jagadish Prasad* (2). It does not appear to us quite convincing, without further argument, that the mere amendment of articles 158 and 178 can *ipso facto* alter the meaning which, as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in article 181. This long catena of decisions may well be said to have, as it were, added the words "under the Code" in the first column of that article. If those words had actually been used in that column then a subsequent amendment of articles 158 and 178 certainly would not have affected the meaning of that article. If, however, as a result of judicial construction, those words have come to be read into the first column as if those words actually occurred therein, we are not of opinion, as at present advised, that the subsequent amendment of articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded is no longer available. We need

(1) A.I.R. 1952 Cal. 689. (2) (1948) 52 C.W.N. 343.

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not, however, on this occasion, pursue the matter further, for we are of the opinion that even if article 181 does apply to the present application it may still be said to be within time. The period of limitation prescribed by that article is three years from the time "when the right to apply accrues." It is true that a further notice after the shares are forfeited, is not necessary to complete the forfeiture of the shares [See *Knight's* case(1)], but it is difficult to see how a person whose share is forfeited and whose name is struck out from the register can apply for rectification of the register until he comes to know of the forfeiture. The same *terminus a quo* is also prescribed in article 120 of the Limitation Act. In *O.R.M.O.M.SP. (Firm)* v. *Nagappa Chettiar*(2) which was a suit to recover trust property from a person who had taken it, with notice of the trust, by a transaction which was a breach of trust, the Privy Council approved and applied the principles of the earlier Indian decisions referred to therein to the case before them and held that the time began to run under article 120 after the plaintiff came to know of the transaction which gave him the right to sue. On the same reasoning we are prepared to extend that principle to the present application under article 181. If article 181 applies then time began to run after the Company came to know of its right to sue. It is not alleged that the Company had any knowledge of the forfeiture between the 5th September, 1941, when the resolution of forfeiture was passed and the 9th September, 1941, when the Company became defunct. After the last mentioned date and up to the 16th February, 1945, the Company stood dissolved and no knowledge or notice can be imputed to the Company during this period. Therefore, the Company must be deemed to have come to know of its cause of action after it came to life again and the present application was certainly made well within three years after that event happened on the 16th February, 1945. If article 181 does not apply then the only article that can

(1) (1867) L.R. 2 Ch. App. 321. (2) I.L.R. [1941] Mad. 175.

apply by analogy is article 120 and the application is also within time. In either view this application cannot be thrown out as barred by limitation.

The result, therefore, is that this appeal must succeed. We set aside the judgment and decree of the High Court in appeal and restore the order of the trial Court. The appellant will be entitled to the costs of the appeal in the High Court as well as in this Court.

BOSE J.—I agree with the conclusions of my learned brothers and also with their reasoning generally but lest it be inferred that I am assenting to a far wider proposition than is actually the case, I deem it advisable to clarify my position about abandonment and waiver. Though the usage of these words in cases of the present kind has the sanction of high authority, they are, in my opinion, inapt and misleading in this class of case. In order to appreciate this it will be necessary to hark back to first principles.

In the first place, waiver and abandonment are in their primary context unilateral acts. Waiver is the intentional relinquishment of a right or privilege. Abandonment is the voluntary giving up of one's rights and privileges or interest in property with the intention of never claiming them again. But except where statutory or other limitations intervene, unilateral acts never in themselves effect a change in legal status because it is fundamental that a man cannot by his unilateral action affect the rights and interests of another except on the basis of statutory or other authority. Rights and obligations are normally intertwined and a man cannot by abandonment *per se* of his rights and interests thereby rid himself of his own obligations or impose them on another. Thus, there can be no abandonment of a tenancy except on statutory grounds (as, for example, in the Central Provinces Tenancy Act, 1920) unless there is acceptance, express or implied, by the other side. It may, for example in a case of tenancy, be to the landlord's interest to keep the tenancy alive; and so also in the case

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of shares of a company. It may be to the interests of the company and the general body of shareholders to refrain from forfeiture if, for example, the value of unpaid calls exceeds the market value of the shares. Such a position was envisaged in *Garden Gully United Quartz Mining Co.* v. *Hugh McLister*(1). So also with waiver. A long catena of illustrative cases will be found collected in B. B. Mitra's Indian Limitation Act, Thirteenth Edition, pages 447 and 448.

This fundamental concept brings about another repercussion. Unless other circumstances intervene, there is a *locus paenitentiae* in which a unilateral abandonment or waiver can be recalled. It would be otherwise if the unilateral act of abandonment in itself, and without the supervention of other matters, effected a change in legal status. In point of fact, it is otherwise when, as in the statutory example I have quoted, the law intervenes and determines the tenancy. It is, therefore, in my opinion, fundamental that abandonment and waiver do not in themselves unilaterally bring about a change in legal status. Something else must intervene, either a statutory mandate or an act of acceptance, express or implied, by another person, or, as Lord Chelmsford put it in *Clarke & Chapman* v. *Hart*(2), acts which are equivalent to an agreement or a licence, or an estoppel in cases where an estoppel can be raised.

Next, there is, in my view, a fundamental difference between an executory interest and an executed one. In the former, it is necessary to resort to equitable reliefs to get enforced a right which is not at the date a vested right: cases of specific performance and declaration of a trust are examples, so also a prayer for relief from forfeiture. In cases of this kind, conduct which would disentitle a person to equitable relief is relevant. No hard and fast rule can or should be laid down as to what such conduct should consist of but among the varieties of conduct which Courts have considered sufficient *in this class of case* is conduct which amounts to laches

(1) (1875-76) 1 App. Cas. 39. at 57. (2) (1858) 10 E.R. 1443 at 1452 and 1453.

or where there has been a standing by or acquiescence or waiver or abandonment of a right, particularly when this would prejudicially affect third parties. This sort of distinction is brought out by Lord Chelmsford in *Clarke & Chapman* v. *Hart* (1).

The position is different when the interest is executed and the man has a vested interest in the right, that is to say, when he is the legal owner of the shares with the legal title to them residing in him. This legal title can only be destroyed in certain specified ways. It is in my view fundamental that the legal title to property, whether moveable or immoveable, cannot pass from one person to another except in legally recognised ways, and normally by the observance of certain recognised forms. Confining myself to the present case, one of the ways in which the title to shares can pass is by forfeiture; but in that case an exact procedure has to be followed. A second way is by transfer which imports agreement. There again there is a regular form of procedure which must be gone through. A third is by estoppel, though, when the position is analysed, it will be found that it is not the estoppel as such which brings about the change. The expressions abandonment, waiver and so forth, when used in a case like the present, are only synonyms for estoppel and despite hallowed usage to the contrary, I prefer to call a spade a spade and put the matter in its proper legal pigeon hole and call it by its proper legal name. These other terms are, in my view, loose and inaccurate and tend to confuse, when applied to cases of the present nature. A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by *mere* laches, or *mere* standing by or even by saying that he has abandoned his right, unless there is something more, namely inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is to say, unless there is an estoppel, pure and simple. It is only in such a case that the right can

(1) 10 E.R. 1443 at 1452 and 1453.

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be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver *as such* which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, that is to say, which prevents him from asserting that the legal forms which in law bring about the extinguishment of his interest and pass the title which resides in him to another, were not duly observed.

Fazl Ali J. and I endeavoured to explain this in *Dhiyan Singh* v. *Jugal Kishore* (1). What happens is this. The person estopped is not allowed to deny the existence of facts, namely the actings of the parties and so forth which would in law bring about the change in legal status, namely the extinguishment of his own title and the transfer of it to another, for estoppel is no more than a rule of evidence which prevents a man from challenging the existence or non-existence of a fact. Once the facts are ascertained, or by a fiction of law are deemed to exist, then it is those facts which bring about the alteration in legal status; it is not the estoppel as such nor is it the abandonment or waiver *per se*. I prefer therefore to adhere to what I conceive is the proper legal nomenclature. As I understand it, estoppel was the basis of the decision in *Clarke & Chapman* v. *Hart* (2). See Lord Wensleydale's judgment at page 1458 and the Lord Chancellor's at page 1453; so also in *Garden Gully United Quartz Mining Company* v. *Hugh McLister* (3).

That there is no sufficient ground for estoppel in this case is shown by the facts set out in the judgment of my learned brothers. I agree that the appeal must succeed.

Appeal allowed.

Agent for the appellant: *S. Subramaniam.*

Agent for the respondent: *M. S. K. Aiyangar.*

(1) [1952] S.C.R. 478 at 485.
(2) 10 E.R. 1443.
(3) 1 App. Cas. 39 at 56 and 57.