APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

RAMESH CHANDRA MITTER

v.

JOGINI MOHAN CHATTERJI*.

1920

March 17.

Company—Register, application to rectify—Companies Act (VII of 1913) s. 38—Mortgagee—Right to summary relief—Practice.

J, a share-holder, applied to have his name removed from the register of the Company under s. 38 of the Indian Companies Act (VII of 1913). R, a mortgagee of the uncalled capital of the shares, came to Court and opposed :

Held, that R was entitled to intervene and oppose, being vitally interested in the proceedings and might be seriously prejudiced by an order for rectification made behind his back.

Held, also, the jurisdiction under s. 38 of the Indian Companies Act (VII of 1913) is unlimited.

Held, further, in a simple case where an immediate rectification is essential, it may be desirable to apply under s. 38 ; but if the case is at all complicated, an action should be brought.

Re Kimberly North Block Diamond Company (1), *In re Ruby Consolidated Mining Company* (2), *In re Sussex Brick Company* (3), and *In re Gresham Life Assurance Society* (4) referred to.

On 19th June, 1915, Jogini Mohan Chatterji agreed to purchase six ordinary shares of Bengal Company Limited, on the understanding that he would be elected one of the Special Directors of the Company, and paid Rs. 1,500 for the six shares, which he received two days later. On 27th June, 1915, the Company entered into an agreement with Ramesh Chandra Mitter, the appellant, for an advance of Rs. 10,000 on security of, amongst others, the uncalled share capital

*Appeal from Original Civil No. 21 of 1919.

(1) (1888) 59 L. T. 579.
(2) (1874) 43 L. J. Ch. 633.
(3) [1904] 1 Ch. 598.
(4) (1872) 42 L. J. Ch. 183.

1920

RAMESH CHANDRA MITTER v. JOGINI MOHAN CHATTERJI.

of the Company. Pursuant to such agreement Mitter advanced Rs. 5,000 on 27th June, 1915, and Rs. 5,000 on 11th January, 1916.

The mortgage-deed, executed on the 21st March 1916, specifically referred to 30 ordinary shares, which included the six shares held by Chatterji.

Chatterji, however, was not appointed a Special Director and demanded return of his money. On 7th May, 1918, he filed a suit in the Calcutta Small Cause Court for recovery of the amount and got a decree on 7th August, 1918. Thereafter he made this application under section 38 of the Indian Companies Act (VII of 1913) to have the register of the Company rectified by removing his name. On that the mortgagee, Mitter, wanted to intervene and oppose but was not allowed to do so. The application was allowed and the order was made. Thereupon the mortgagee preferred this appeal.

Mr. B. L. Mitter (with him *Mr. S. C. Bose*), for the appellant. Section 38, sub-section (*3*), of the Indian Companies Act says, "and generally may decide any question necessary or expedient to be decided for rectification of register." When the Court entertains the application it is bound to go into all the circumstances of the case: *Trevor* v. *Whitworth* (1). The jurisdiction under section 38 is unlimited. If from complexity or otherwise the Court thinks that any case should be more satisfactorily dealt with by an action, the Court will decline to make the order. *In re National and Provincial Marine Insurance Company* (2); Halsbury's Laws of England, Vol. V, page 154.

Mr. B. C. Ghose (with him *Mr. Langford James*), for the respondent. The word 'generally' in section

(1) (1887) 12 App. Cas. 409. (2) (1867) 2 Ch. App. 685.

38, sub-section (*3*), is to be taken as restricted by the preceding words. The question must be a question between members or alleged members of the Company or between members on the one hand and the Company on the other.

MOOKERJEE J. This is an appeal from an order made by Mr. Justice Chaudhuri on an application under section 38 of the Indian Companies Act for the removal of the name of the respondent from the register of members of a Company known as the Bengal Co., Ltd.

On the 19th June, 1915, the respondent agreed to purchase six ordinary shares of the Company on the understanding that he would be elected as one of its Special Directors. On the same date, he paid Rs. 1,500 for the six shares which were issued to him two days later. On the 27th June, 1915, the appellant entered into an agreement with the Company for a first charge to the extent of Rs. 10,000 on all uncalled share capital; he advanced Rs. 5,000 on the same day and the balance was paid on the 11th January, 1916. The mortgage instrument, which was executed by the Company in favour of the appellant on the 21st March, 1916, referred specifically to thirty ordinary shares of Rs. 1,000 each, six ordinary shares, class 'A', of Rs. 500 each, and twenty-seven preference shares of Rs. 100. It is not disputed that the six ordinary shares specified in the schedule to the document are those that belonged to the respondent; consequently, there can be no doubt that the appellant had a specific charge on the six shares in question.

It appears that the respondent was not elected as a Special Director. He thereupon instituted a suit in the Court of Small Causes, on the 7th May, 1918, for damages for breach of agreement and obtained a decree

1920

RAMESH CHANDRA MITTER v. JOGINI MOHAN CHATTERJI.

MOOKERJEE J.

against the Company on the 7th August, 1918. On the 20th December, 1918, the respondent made an application under section 38 of the Indian Companies Act, with a view to have his name removed from the register of members of the Company. The Company did not oppose the application, which was, however, contested by the present appellant. Mr. Justice Chaudhuri expressed a doubt, whether the appellant, a mortgagee of the Company, had *locus standi* in these proceedings, but held that even if he was allowed to intervene, it would be inexpedient to decide summarily the objection raised by him. In this view, Mr. Justice Chaudhuri, on the 4th March, 1919, made an order in favour of the respondent, without opportunity afforded to the appellant to place his objections before the Court for adjudication. The mortgagee accordingly lodged this appeal on the 11th April, 1919. Thereafter, on the 16th June, 1919, the respondent made an application for liquidation of the Company and three days later obtained an order in that behalf. The appellant has now argued, first, that section 38 is comprehensive enough to entitle a person in his position to oppose the application of the respondent for removal of his name from the register of members of the Company; and, secondly, that on the indisputable facts of the case, the application should have been refused on the merits. In our opinion, these contentions are well founded.

It is now well settled that although persons are not entitled to an order *ex debito justicæ*, the jurisdiction under section 38 is unlimited, with a discretion in the Court in the circumstances of each case. In support of this proposition, reference may be made to the decisions in *Re Kimberley North Block Diamond Company* (1), *In re Ruby Consolidated Mining*

(1) (1888) 59 L. T. 579.

Company (1), *In re Sussex Brick Company* (2), and *In re Gresham Life Assurance Society* (3). In a simple case where an immediate rectification is essential, it may be desirable to apply under the section; but if the case is at all complicated, an action should be brought. The respondent has, however, argued that section 38 does not authorise the Court to consider a dispute between a member and a stranger. In support of this proposition, reliance has been placed upon the language of sub-section (3) of section 38 which is in these terms: "On any application under this section, the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the Company on the other hand: and, generally, may decide any question necessary or expedient to be decided for rectification of the register." Mr. Ghose has contended that the generality of the concluding words of the sub-section is materially restricted by what precedes, and that notwithstanding their comprehensive phraseology, we are bound to hold that "a question necessary or expedient to be decided for rectification of the register" must be a question between members or alleged members, or between members on the one hand and the Company on the other hand. We are of opinion that we should not adopt this narrow interpretation of the section. The Legislature obviously intended that the Court should have the widest possible power to determine, in its discretion, questions which may appear to it to be necessary or expedient for decision before an order

(1) (1874) 43 L. J. Ch. 633. (2) [1904] 1 Ch. 598.
(3) (1872) 42 L. J. Ch. 183.

1920

RAMESH CHANDRA MITTER v. JOGINI MOHAN CHATTERJI.

MOOKERJEE J.

for rectification is made or refused. In the case before us, the appellant was manifestly entitled to intervene to oppose the application made by the respondent. He is vitally interested in these proceedings and his position might be seriously prejudiced by an order for rectification made behind his back. There is no conceivable reason why the respondent should be allowed to obtain an *ex parte* order, and the appellant should be driven to fight him in a suit brought for the purpose.

We may point out that the respondent has hitherto proceeded on the assumption that there was a valid contract between him and the Company. There was admittedly an agreement between him and the Company for the transfer of six shares. He obtained the shares, and, on the basis of his position as a share-holder, got his name entered in the register of the Company. Subsequently, he sued the Company successfully in the Court of Small Causes for damages for breach of contract. That suit could be maintained, only on the assumption that there was a valid contract between him and the Company, which had been unlawfully broken by them. In these circumstances, there can be no room for controversy that he was a share-holder and that the appellant had a valid charge on the uncalled capital covered by those shares. The appellant must consequently be heard, on the elementary principle that no man should be prejudiced unheard. The view we take follows as a corollary from the principle that the register of members is the creditors' guarantee, showing them to whom and to what they have to trust, and must consequently be properly kept, so that the names appearing therein are all the names and nothing but the names of the persons really for the time being liable to the creditors.

1920

RAMESH CHANDRA MITTER v. JOGINI MOHAN CHATTERJI.

The result is that this appeal is allowed and the application made by the respondent dismissed with costs in both Courts.

FLETCHER J. I agree. *Appeal allowed.*

N. G.

Attorney for the appellant : *K. K. Dutt.*

Attorneys for the respondents : *Chatterji & Co.*

ORIGINAL CIVIL.

Before Rankin J.

D. E D. J. EZRA

v.

J. E. GUBBAY.*

1920

April 14.

Possession—Resistance to delivery of possession to decree-holder—Claim to be in possession of the property as a tenant under the judgment-debtor—Sub-tenant—Civil Procedure Code, 1908, O. XXI, rr. 97, 99—Parties.

On the 7th July 1919 the plaintiff instituted a suit against his lessee for the recovery of possession of certain premises upon the determination of the term by forfeiture for breach of conditions in the lease. In that suit the plaintiff did not join as defendant, the respondent who was admittedly in possession of the said premises as under-tenant of the lessee. On the 18th December 1919, an order was made for the recovery of possession in the said suit by which the lessee was given time until the 29th February, 1920, to make over possession. This not being done, an order, dated the 12th March 1920, was obtained by the plaintiff directing the Sheriff to put him into possession. The Sheriff on the 8th April, 1920, was obstructed in the execution of this order by the respondent and the plaintiff thereupon made this application before the sitting Judge in Chambers complaining of such obstruction under Order XXI, r. 97. The respondent was summoned to appear to answer the said complaint :—

Held, that the application must be dismissed and the plaintiff must be left to his remedy by suit against the respondent.

* Original Civil Suit No. 1754 of 1919.