Privy Council Appeal No. 126 *of* 1924.

Maneckji Pestonji Bharucha and another - - - - *Appellants*

v.

Wadilal Sarabhai and Company - - - - - *Respondents*

Same - - - - - - - - - - *Appellants*

v.

Maganlal Chunilal Ghia - - - - - - *Respondent*

(*Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MARCH, 1926.

Present at the Hearing:
VISCOUNT DUNEDIN.
LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
LORD SALVESEN.

[*Delivered by* VISCOUNT DUNEDIN.]

In March, 1920, the second plaintiff in this case, Arajania, who is not a certified share-broker, and who describes himself as the sub-broker of the first plaintiff Bharucha, who is a certified share-broker, sold on the Bombay Stock Exchange to first defendant, Gora, 129 shares of a Company called Alcock, Ashdown & Co., Ltd., for delivery on the 14th April, 1920. Neither of the two plaintiffs was the registered holder of any such shares. In order to make good the delivery the first plaintiff acquired the requisite number of shares in the market from various brokers, and took from these brokers blank transfers signed by the

registered holders along with the corresponding certificates. These certificates and blank transfers were handed by the second plaintiff to the first defendant at 6 p.m. on the 14th April. At 8 p.m. a cheque for the sum due under the contract in favour of the first plaintiff was handed to the second plaintiff. This cheque was dishonoured on the next day.

The first defendant, having had the blank transfers and certificates thus delivered to him, made certain propositions as to the raising of money to Manilal, a partner in the firm of Wadilal & Co., the second defendants, and handed the certificates and transfers to him. The second defendant in turn handed them to the third defendant, Ghia, again on certain propositions as to raising money.

The cheque was never honoured, and the first defendant absconded. The present action is brought by the first and second plaintiffs against all the three defendants, asking for return of the certificates and blank transfers or otherwise for damages.

Proof was led before the Trial Judge, who held in fact (1) that plaintiff No. 2 acted as sub-broker to plaintiff No. 1, and that, accordingly, plaintiff No. 1 had a direct title to sue the other defendants; (2) that Manilal, the defendant No. 2, knew when he took the certificates and shares that the cheque of Gora, defendant No. 1, was not likely to be honoured. He gave a decree in favour of plaintiff No. 1 against all defendants. The ratio of his judgment is to be found in the following passage :—

> " Gora was only an ostensible owner and the plaintiffs, who were the unpaid vendors, had equity in them, and they could have stopped Gora from getting these shares transferred in his name in the books of the Company, but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted *bona fide* and without notice, then I certainly think that such a person would have a better title to these shares than the plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner. . . . Manilal had notice that these shares were not paid for, and Ghia, being a mere nominee of Manilal, Ghia was in no better position than Manilal himself. They took these shares with the infirmity from Gora, and therefore they cannot claim these shares in priority to the plaintiffs."

He had previously pointed out that in a question with the Company the owners of the shares were the old owners who had signed the blank transfers.

On appeal by the second and third defendants the learned Judges of the Appellate Division of the High Court reversed the judgment of the Trial Judge and dismissed the action as against them. They held on the facts that plaintiff No. 2 had acted as agent for plaintiff No. 1, and that consequently, as plaintiff No. 2 was not a certified broker, the buyer was not affected by the rules of the Stock Exchange. This is only of importance as regards a certain Rule C, with which their Lordships will afterwards deal. On the merits of the case they held that, under the Indian Contract Act, the property of the shares as sold passed on the delivery of the certificates and blank transfers to Gora; that, after that, plaintiff

No. 1 had no claim against Gora except upon the cheque; that consequently he had no claim against defendants Nos. 2 and 3, and could not have a judgment against defendant No. 3 for delivery of the certificates and transfers. They held further that section 121 of the Contract Act, which is in these terms—

> 121. "When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled,"

prevented the plaintiff from rescinding the sale, there having been no stipulation provided in the contract for sale that he should be so entitled. Appeal was then taken by the plaintiffs to the King in Council.

Their Lordships agree that the stipulation referred to in the section must be an express stipulation and that, as nothing was proved to the contrary, it must be presumed that the contract here was an ordinary contract for the sale of shares effected by bought and sold notes.

On the hearing of the appeal to their Lordships, the view expressed by the Trial Judge that Gora was only an ostensible owner of the shares and the plaintiff, who was the unpaid vendor, had the equity in them, was elaborated into an argument that, according to the law of England, there would be an equitable lien in favour of the unpaid purchaser and that that law applied. Such a view would be so far-reaching in ordinary Stock Exchange transactions that their Lordships think it necessary to emphasise their view of its unsoundness. In the first place, so far as lien is concerned, the law as to lien is statutory and is contained in the 95th and following sections of the Indian Contract Act. Section 95 applies to this case; unless there is possession there is no lien. But, further, there seems to their Lordships a good deal of confusion arising from the prominence given to the fact that the full property in shares in a Company is only in the registered holder. That is quite true. It is true that what Bharucha had was not the perfected right of property, which he would have had if he had been the registered holder of the shares which he was selling. The Company is entitled to deal with the shareholder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate, together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been

choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of choses in action are goods. Hence equitable considerations not applicable to goods do not apply to shares in India.

Now section 78 is as follows :—

> " 78. Sale is effected by offer and acceptance of ascertained goods for a price, * * *
> or of a price for ascertained goods, * * *
> together with payment of the price or delivery of the goods."

Here the goods were not ascertained goods at the time of the contract, for the contract was only for so many shares of Alcocks', not of any particular shares, but then section 83 provides :—

> " 83. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

So soon, therefore, as Arajania, acting for Bharucha, handed Gora the certificates and transfers and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the property passed. From that time onward Bharucha and Arajania could only sue Gora on the cheque, or for the price of the shares unpaid in respect that the cheque had not been honoured. They had no longer any *jus in re* of the certificates and transfers. They had no statutory lien, for they had parted with possession, and, consequently, as they had no contract with defendants Nos. 2 and 3, they could not sue them for delivery of the shares, whether the defendants had got good title as against Gora or had not.

Their Lordships have already mentioned that the Trial Judge held that the sale was between brokers, and was, therefore, under the rules of the Stock Exchange, from which finding the Court of Appeal dissented. In their Lordships' view it is not necessary to decide this question of fact. They will assume, for the purpose of the argument, that the sale was as between brokers. That brings in Rule C of the Bombay Stock Exchange, which is as follows :—

> " C. If the cheque given for the monies of the shares will not be honoured at the bank on the day following the day when the cheque is given, the shares shall have to be returned immediately to the person selling (them), and the person purchasing (them) shall have to take away those shares having paid the rupees in cash before two o'clock on that very day. And if the person purchasing shall fail to do so, those shares will be sold off by auction before three o'clock.
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> * * * *

It was argued that the effect of this rule was to make the delivery not actual but conditional, with the result that the property did not really pass till the cheque was honoured. Their Lordships

consider this argument quite unsound. The Contract Act settles that property is to pass on delivery. Delivery is a fact, and the statutory result must follow. Further, the rule cannot be read as an express stipulation in the sense of section 121 because it does not say what section 121 provides must be said. But in truth, in their Lordships' view, the rule in question had nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose. The buyer may be unable, from temporary embarrassment, to meet his cheque on an exact day. Time is of the essence of this ordinary contract of sale of shares, therefore he is enjoined by the rule to hand back the shares; he is given the latitude of paying up till 2.0 o'clock, but if he does not do so then they are sold by the authorities, so as to fix, without further ado, the damages which are become due for breach of contract.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

MANECKJI PESTONJI BHARUCHA AND ANOTHER

v.

WADILAL SARABHAI AND COMPANY

SAME

v.

MAGANLAL CHUNILAL GHIA.

(Consolidated Appeals.)

DELIVERED BY VISCOUNT DUNEDIN.

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