23, 1948

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.
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INSTITUTE OF ADVANCED
LEGAL STUDIES
44213

ON APPEAL

FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL, JERUSALEM.

BETWEEN—

MARGARETE LINZ née SPRINGER *Appellant*

— AND —

THE ELECTRIC WIRE COMPANY OF PALESTINE LIMITED *Respondent.*

RESPONDENTS CASE

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal from the Judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 7th February, 1945, affirming the Judgment of the District Court of Haifa dated the 28th July, 1944, that had dismissed the Appellant's claim against the Respondent.

p. 54.
pp. 35-51.

2. The Respondent Company is a Public Company that was registered in Palestine in October, 1934. The question raised by this appeal is whether the Appellant is entitled to have returned to her at the appropriate rate of exchange the sum of RM. 11,039.24 paid by her for shares in the Respondent Company, on the ground that the consideration therefor has wholly failed.

3. At the material time there was registered in Palestine a company, conveniently referred to as "Haavara", that under an arrangement with the then German Government was the principal agent for the export from Germany to Palestine of assets belonging to German Jews. One mode that was adopted for the export of such assets was by the deposit in Germany of Marks (to be used *e.g.* for

the purchase of goods) against the allotment of shares in Palestinian Companies. The Appellant was desirous of taking advantage of the facilities afforded by "Haavara's" arrangement with the German Government to obtain shares in the Respondent Company against a deposit of Marks in Germany.

p. 64.

4. On the 11th April, 1935, a Resolution assented to by all the shareholders in the Respondent Company was passed providing that of the unissued share capital of the Company, LP. 11,000 should be issued as Preference Shares carrying the dividend and rights set out in the said Resolution. 10

5. On the 19th April, 1935, the Appellant made a formal application for LP. 775 of the said Preference Shares, to be paid for by Marks in Germany. The actual amount paid by the Appellant was RM. 11,039.24. From this sum there fell to be deducted RM. 1,545.49, the fees charged by "Haavara" for its services, leaving a sum of RM. 9,493.75 which at the then rate of exchange, namely RM. 12.25 to LP. 1, gives the figure of LP. 775. It subseqeuntly appeared that the Appellant had been charged by "Haavara" for its services more than she should have been and that there was accordingly a further sum to be credited to her, namely, LP. 38. 20

6. On the 7th July, 1935, the Respondent Company duly allotted to the Appellant Preference Shares to the said amount of LP. 775 and 38 Ordinary Shares in respect of the LP. 38 due to her as aforesaid. On the 23rd July, 1935 the Appellant applied to the Respondent Company for 12 further Ordinary Shares, and these were in due course allotted to her, making her total holding of Ordinary Shares 50. The allotment of both classes of shares was in due course notified to the Registrar of Companies and Share Certificates Nos. 62 and 33 duly issued to the Appellant. In the District Court the Appellant stated that the Ordinary Shares—whether she was 30 referring to the whole of the 50 or only to the 38 is not perhaps clear—were a gift to her, but this was found against her in the District Court and the finding was confirmed in the Supreme Court.

p. 75.
p. 12, l. 46.
p. 44, l. 39.
p. 55, l. 15.

7. On the 5th February, 1939, the Appellant approached the Holland Bank Union with a view to them selling for her the said 775 Preference Shares and 50 Ordinary Shares and ultimately she sold both lots of shares through the Bank. The Palestine Independent Trust Association Limited purchased the Preference Shares and one Dr. Siegmar Bromberger the Ordinary Shares. The Share Certificates of the Appellant in respect of her holding of both 40 classes of shares were accordingly cancelled and new Share Certificates issued to the purchasers.

p. 81.

p. 96.

8. On the 28th March, 1943 the Appellant's lawyers wrote a letter to the Respondent claiming that there had been no valid

allotment to her of Preference Shares on the ground that the Special Resolution purporting to create the 11,000 Preference Shares was invalid and *ultra vires* the Respondent and stating on her behalf that "she withdraws her application for Preference Shares in your "Company." The Letter concluded by demanding the payment of the sum of LP. 1,025 being (so it was stated) the equivalent of RM. 11,039.24 calculated at the "official" rate of exchange of RM. 10.77 to LP. 1.

p. 97, l. 8.

p. 97, l. 13.

9. On the 30th April, 1943, the Appellant commenced

p. 1.

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THE PRESENT SUIT

in which by her amended Statement of Claim dated the 21st January, 1944, she repeated the averments set out in the said letter, and, alternatively to her said claim for LP. 1,025, claimed the return of the said RM. 11,039.24 at the rate of exchange obtaining immediately before the outbreak of war, that is at RM. 9.50 to LP. 1, or LP. 1,162.

p. 3, l. 11.

10. The Respondent is not aware of any reason why, if the Appellant has any claim at all in respect of the transaction complained of, the rate of exchange should be fixed at that obtaining
20 immediately before the outbreak of war. Nor, it is submitted, has the rate of RM. 10.75 to LP. 1 any relevance. This is the rate that was arbitrarily fixed by the High Commissioner during the war for the purposes and solely for the purposes of the Trading with the Enemy legislation, and had no relation whatever to the Sterling equivalent of Reichsmarks at the market rate even if there were a market rate. This aspect of the matter was not pursued in Palestine as neither Court thought that the Appellant had any claim at all. During the war it was not legal to deal in Reichsmarks at all, and it is, it is submitted, not an illegitimate inference that at all material
30 times the Reichsmarks in question were either valueless or had at most a purely speculative value.

cf. e.g. p. 22, l. 49.

11. In her amended Statement of Claim the Appellant did not mention the 38 Ordinary Shares which she had received as part of the consideration, nor did she mention that she had disposed of the whole of her shareholding in the Respondent Company.

12. On the 14th May, 1944, Special Resolutions were passed by the Respondent confirming the said Resolution of the 12th April, 1935, and whilst expressly stating that nothing contained in the Resolutions passed on the said 14th May, 1944, should in any way be
40 deemed an admission that the said Resolution of 12th April, 1935, was in any way deficient or defective or that it was not lawfully or

p. 110.

validly passed or that the Preference Shares issued thereunder were not lawfully or validly created, expressly stated that the said shares "shall be and shall always be deemed to have been Preference Shares "having the rights and privileges more fully described in the said "Resolution" (that is, of the 12th April, 1935) "and that the said "Preference Shares shall be considered as validly created and as "subsisting".

p. 111, l. 9.

13. The evidence at the hearing in the District Court of Haifa (Judges Shems and Nasr) was mainly directed to matters that are not now in issue. Dr. Broide, Managing Director of the Respondent, gave evidence that every person who was a shareholder of the Respondent at the time had subscribed to the Resolution of the 12th April, 1935, and that until an action brought by one Regina Schlesinger in the year 1941, the said Resolution had never been questioned, but had been acted on throughout as valid and subsisting. He also proved that until she had disposed of her shares the Appellant's name had figured in every annual return of allotments since 1935, as the holder of both the 775 Preference Shares and the 50 Ordinary Shares. The Appellant relied upon a compromise effected between the said Regina Schlesinger and the Respondent on the 18th February, 1943, as containing an admission that the said Resolution of the 12th April, 1935, had not been properly passed and that the allotment of the Preference Shares that purported to have been made consequent thereon was void. The Respondent submitted that a compromise arrived at between it and another claimant, moreover one who had not disposed of her shares could not avail the Appellant.

pp. 10-26.
p. 23, ll. 25-40.
p. 92.

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14. Lengthy arguments were addressed to the Court by both parties at the close of the evidence. On behalf of the Respondent it was pointed out that the Appellant's claim was not for damages but for the return of money paid on a consideration that it was alleged had wholly failed owing to the contract being one that was *ultra vires* the Company, and that if this was so the money that the Appellant had paid had been utilised in the purchase of machinery and could not be traced, and that, if it was a question of restoring a credit that the Respondent had received, this could not be done as the credit was in Reichsmarks which it would have been illegal to purchase or to restore.

p. 29, l. 46.
p. 30, l. 4.

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15. Each of the judges delivered a judgment on the 28th July, 1944, concurring that the Appellant's claim should be dismissed. The judgment of Judge Shems went into the facts in great detail. In it he said:—

pp. 35-51.

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"It is evident from the above (that is Article 48 of the "Articles) that although the Memorandum states that the

p. 45, l. 50.

"capital is LP. 25,000 divided into 25,000 Ordinary Shares of "LP. 1 each, the Articles of Association contemplate the possi-"bility of the existence of different classes of shares.

"The subject matter of the Resolution (that is, of the 12th "April, 1935), was discussed previously with every other share-"holder, and they all knew of the meeting to be held, although "they did not all convene themselves by meeting together, but "signed the minutes adopting the Resolution... The purpose "of the meeting is to obtain the view of the shareholders to a "proposed resolution. In this case the eight subscribers who "were also the sole shareholders of the defendant Company had "previous to the formal meeting of three or four of them on "12th April, 1935, discussed the resolution and agreed to it. "They signed it when it was passed to them, and in the circum-"stances the purpose of the meeting had been achieved, and the "form of it is not in itself a good cause to declare the resolution "agreed to as invalid.

p. 47, l. 27.

p. 47, l. 41.

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"In any event the resolution, if *intra vires* the Company "was ratified by the Company at a meeting held on 14th May, "1944, during the currency of these proceedings.

p. 48, l. 16.

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"The next point is whether the resolution was *ultra vires* the "Memorandum of Association of the Defendant Company.

"An Ordinary Share entitles its owner to an equal propor-"tional participation in the management and profits during "corporate life and in the net assets in case of winding-up. The "Preference Share, on the other hand, entitles its owner to some "preference in the distribution of dividends and in the assets of "the Company. It is clear that in this case as the shares were "described or specified as Ordinary no special or particular right "was attached to them. In effect, the word 'Ordinary' has not "added anything as a specific right attaching to the shares of "the Company. It did not make it a condition that there shall "be equality among the shareholders. Consequently the "Company may regulate the issue of the shares and the various "classes thereof in its Articles of Association either as originally "framed or as altered by a Special Resolution. There was a "Special Resolution (Exhibit P/1 (c)) passed, all the share-"holders assented to it and consequently the Preference Shares "issued as a consequence of this Resolution were validly issued.

p. 48, l. 40.

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"Even and supposing that the shares were not validly "issued, the Plaintiff cannot after such a long period from July, "1935, until March, 1943, contest the validity of the shares held "by her and disposed of by her for consideration.

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p. 49, l. 40.

"The compromise in the Schlesinger case, Exhibit P/10, "the Circular Letter D/10 and the Resolution passed on the 14th "May, 1944, Exhibit D/19, do not affect the fact of the validity "of the Resolution of the 12th April, 1935.

p. 50. l. 9.

"The Plaintiff has transferred the shares allotted to her, "both the Preference Shares and the Ordinary Shares. The "transfer of these shares was a valid transfer, and the change "of ownership was duly effected in the registers of the Defendant "Company. The Plaintiff received 775 Preference Shares and "38 Ordinary Shares in full satisfaction of the amount paid by 10 "her in Germany to 'Haavara' to be put to the credit of the "Defendant Company. In view of the facts established in this "case...she cannot maintain her claim in these proceedings and "is estopped from making it."

p. 50. l. 17.

p. 50.

16. Judge Nasr delivered a short judgment in which he held that the Resolution of the 12th April, 1935, was valid and *intra vires* the Company.

p. 54.

17. The Appellant appealed to the Supreme Court (Shaw and Frumkin JJ.) where her appeal was dismissed without the Respondent being called on. Their Lordships came to the conclusion that 20 it was not necessary for them to decide whether the Preference Shares were valid or not as the appeal must fail on other grounds. These grounds they stated as follows:—

p. 54, l. 29.

p. 55, l. 19.

"The Appellant's case is that the 38 shares were a gift to "her, but the Court below held, and we agree with that finding, "that this formed part of the consideration for the money which "the Appellant had paid in Germany.

p. 55, l. 27.

"It is admitted that the Appellant in 1939, sold the 775 "Preference Shares to the Palestine Independent Trust Associa-"tion Limited for the sum of LP. .125. She also sold the 50 30 "Ordinary Shares to Dr. Siegmar Bromberger for LP. 5. The "Share Certificates of the Appellant, in respect both of the 775 "Preference Shares and of the 50 Ordinary Shares, were "cancelled. So the Appellant is no longer in possession of the "Share Certificates, and she is not in a position to return them "to the Respondent Company.

"Now, whether or not the Preference Shares were validly "issued, the fact remains that the Appellant transferred them for "value. It is not suggested that the Company was acting deceit-"fully when it issued the Share Certificates. Their issue was 40 "approved by all the shareholders of the Company, without any "exception. Nor is it suggested that the Company did not "intend to honour the Share Certificates. If the Appellant had "not parted with the Share Certificates, it is admitted that she

p. 55, l. 45.

"now could have obtained for them considerably more than she "gave.

"The Appellant must be held to have had constructive "notice of the Memorandum and Articles of Association of the "Company and we consider that if she wished to take exception "to the Share Certificates, the time to do so was before she "accepted them, or at least while they were still in her hands."

18. The Respondent submits that the judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 7th February, 1945, is right and that this Appeal should be dismissed for the following among other

REASONS.

1. BECAUSE at the time of action brought the Appellant was no longer in possession of the shares in question.
2. BECAUSE the Appellant had received consideration for the said payment of RM. 11,039.24.
3. BECAUSE the shares in question had been validly issued.
4. BECAUSE all the shareholders of the Respondent Company had approved the Resolution of the 12th April, 1935.
5. BECAUSE the said Resolution was *intra vires* the Respondent Company.
6. BECAUSE the consideration for the said payment of RM. 11,039.24 had not wholly failed.
7. BECAUSE of the Resolution of the 14th May, 1944.
8. BECAUSE if the contract on which the Appellant relied was *ultra vires* the Respondent the Appellant would not be entitled to recover the money paid thereunder as the same could not be traced in specie, and further the return thereof was illegal.
9. BECAUSE at all material times the Appellant's Reichsmarks were valueless.
10. BECAUSE there are concurrent findings of fact that part of the consideration for the payment made by the Appellant was the 38 Ordinary Shares duly allotted to her.
11. BECAUSE the judgments of the District Court and of the Supreme Court are right and should be affirmed.

PHINEAS QUASS.

In the Privy Council. No 63 of 194

ON APPEAL

FROM THE SUPREME COURT SITTING AS A COURT OF APPEAL, JERUSALEM.

MARGARETE LINZ née SPRINGER

— AND —

THE ELECTRIC WIRE COMPANY OF PALESTINE LIMITED.

CASE FOR THE RESPONDENT.

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