Privy Council Appeal No. 63 of 1946

Margaret Linz – – – – – – – – – *Appellant*

v.

The Electric Wire Company of Palestine Ltd. – – *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1948

Present at the Hearing :
LORD SIMONDS
LORD MORTON OF HENRYTON
SIR MADHAVAN NAIR
[*Delivered by* LORD SIMONDS]

In this appeal, which is brought from a judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, affirming the judgment of the District Court of Haifa, a number of questions have been raised which their Lordships do not think it necessary to discuss. They concur in the view of the Supreme Court that the appellant's case can be shortly disposed of and, agreeing as they do with that Court's reasons and conclusion, do not propose to examine at length facts and contentions which are not strictly relevant to the question now to be considered.

The respondent is a public company registered in Palestine in October, 1934. By clause 4 of its Memorandum of Association its capital was L.P.25,000 divided into 25,000 shares of L.P.1 each. In April, 1935, one of such shares had been issued to each of the eight subscribers to the Memorandum.

On the 12th April, 1935, the eight shareholders purported to pass a resolution which provided that of the unissued share capital of the company L.P.11,000 should be issued as preference shares carrying the dividend and rights set out therein. The validity of this resolution and of the subsequent issue of preference shares has been challenged on divers grounds. Without determining that question their Lordships will assume for the purpose of this appeal that the issue was invalid.

On the 19th April, 1935, the appellant made a formal application for L.P.775 of the said preference shares to be paid for by Reichsmarks in Germany and such shares were allotted to her on the 7th July, 1935, after which the relevant certificate was issued to her, and she was duly registered as the proprietor thereof. The transaction was somewhat complicated by the fact that, in consequence of an arrangement made between the respondent company and a company which was conveniently called " Haavara " and of the assumption by the appellant of the obligation to pay certain so-called " transfer fees," she paid in Germany a sum of RM.11,039.24, of which RM.9493.75 represented L.P.775 at the then rate of exchange of RM.12.25 to L.P.1 and the balance of RM.1545.49 the fees which she had agreed to pay, and by the further fact that upon the footing that she had been overcharged in respect of those fees " Haavara " credited the respondent company and the respondent company in turn

credited her with a certain sum of RM. which was satisfied by the allotment to her of 38 ordinary shares of the company. In considering the question, to which they must shortly come, whether the appellant is entitled to recover from the respondent company the money paid by her for the preference shares upon the footing of a total failure of consideration, their Lordships are content to ignore and treat as the outcome of a separate transaction the receipt by her of the 38 ordinary shares.

The appellant held her shares for four years and then sold her 775 preference shares and also her ordinary shares, of which she had increased her holding to 50, through the Holland Bank Union for L.P.116,250 and L.P.3,750 respectively. The transaction is somewhat obscure but it is not in doubt that she executed transfers in blank which were ultimately on the 28th September, 1941, completed as to the preference shares in favour of the Palestine Independent Trust Association Ltd. and as to the ordinary shares in favour of one Bromberger and that these transfers were duly registered with the respondent company and the old certificates cancelled and new ones issued and the transferees placed on the register of members of the company in place of the appellant.

It has not been suggested that at this time any doubt had arisen in the mind of the appellant as to the validity of the issue of preference shares but in the same year another original allotee of such shares commenced an action against the company and certain of its directors claiming repayment of the money paid by her for such shares upon the ground (to put it shortly) that they had not been validly issued. And in these proceedings on the 18th February, 1943, an order was made confirming terms of compromise by which (inter alia) the company admitted that the resolution of the 12th April, 1935, was not properly passed and that the allotment of preference shares to the plaintiff in those proceedings was void. Shortly thereafter the respondent company circularised the then registered holders of preference shares offering to repay them the amounts paid by them for their shares.

No similar offer having been made to the appellant who had previously disposed of her shares, on the 28th March, 1943, her advisers wrote to the company demanding repayment of the sums paid by her for her 775 preference shares and stating that she withdrew her application for preference shares as there had been a delay for nearly 8 years, and that she would repudiate any allotment of shares the company might be advised to make in the future.

At the same time they wrote a letter to the Holland Bank Union (to which, since learned counsel for the appellant relies on it, it is proper to refer) enclosing a copy of their letter to the company and saying " Now we wish to make it clear that our client does not desire to collect from the company the amount due to her from it and at the same time to retain the sum she received from you in 1939." It cannot, however, fail to be observed that there is an implication that, if for any reason the appellant cannot recover from the company, she will not relinquish the money received from the Bank.

The company having refused to accede to the appellant's demand, she brought the action out of which this appeal arises. By it she claimed a refund of the sum paid by her for the 775 preference shares alleging that she " did not receive the consideration which she bargained for or any consideration." Her action in simplest terms was for money had and received upon a total failure of consideration and it was frankly admitted by her learned counsel upon this appeal that, if she could not sustain that plea, her action was rightly dismissed and this appeal must fail.

The question then is whether there was a total failure of consideration moving from the respondent company. Their Lordships would at once dismiss as irrelevant to the determination of this question the fact that the appellant spontaneously offered in a certain event to refund to the Bank the money she had received upon the sale of her shares. Equally irrelevant is the fact that she obtained substantially less than she had paid for her shares. Her rights against the company must be the same

whether she sold them at their par value or for more or less. Their Lordships agree with the learned Judges of the Supreme Court in thinking that the relevant plea can by no means be sustained. It appears to them that, having been duly registered as a shareholder and having parted for value with her shares by a sale which the company recognised by issue of a share certificate to, and registration of, her transferee, she got exactly that which she bargained to get. Whether that transferee, finding that the shares had not been validly issued, would have any claim against her is a question which does not fall to be determined. But it appears to their Lordships to be idle to suggest that one who has parted with her shares for value can at a later date (it may be against the wish and against the interest of her transferee) challenge the validity of the issue and, succeeding in that challenge, then claim that she received something of no value and that there was a total failure of consideration. On the contrary, whether the issue was valid or invalid, a matter no longer important to her but vitally important to her transferee, she received something from the company which was worth to her just what she got for it. Their Lordships do not question the general proposition that, where an ultra vires issue of shares has been made, the subscribers are entitled to get their money back, but this does not justify the claim of one, who has sold her shares, at a later date to assert that they have not been lawfully issued, much less to assert, contrary to the plain fact, that there has been, so far as she was concerned, a total failure of consideration. Learned counsel for the appellant relied on the authority of *Rowland* v. *Divall,* 1923 2 K.B. 500. That case might have assisted him, if the fact was that the appellant still held the shares, even though she had received a dividend upon them. Upon this their Lordships express no opinion. But it does not avail him in a case where the shareholder has sold his shares.

For these reasons it is unnecessary to investigate the question whether or not the issue was for any reason invalid—a question indeed which it would, as their Lordships think, in any case be improper to discuss in the absence of the transferee, the party truly interested.

Upon the broad ground that the appellant has failed to sustain the plea of total failure of consideration, their Lordships are of opinion that this appeal should be dismissed with costs and they will humbly advise His Majesty accordingly.

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In the Privy Council

MARGARET LILZ

v.

THE ELECTRIC WIRE COMPANY OF PALESTINE LTD.

DELIVERED BY LORD SIMONDS

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