


Original Civil Jurisdiction.

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Suit No. 760 of 1865.

1865.
 Nov. 25.

THE IMPERIAL BANKING AND TRADING COMPANY

v.

A'TMA'RA'M MA'DHAVJI.

Sale of Shares for future delivery—Mutual Covenants for transfer and payment—Readiness and Willingness.

A contracts with B to sell him three numbered shares, to be transferred, upon payment of the price by B, on or before a certain day:—*Held* that the covenants to transfer and to pay the price are concurrent; and that the ability of A to constitute B the legal owner of the shares, contracted to be sold, together with willingness to do so, amounts to “readiness and willingness” on the part of A to fulfil his part of the contract.

THIS suit was brought by the plaintiffs to recover from the defendant the sum of Rs. 33,300 and interest, as damages for breach of a contract, dated the 12th of January 1865, and made between the plaintiffs and the defendant, whereby the plaintiffs, in consideration of Rs. 300 then paid to them by the defendant, and of the further sum of Rs. 33,300, to be paid as thereafter mentioned, agreed to sell to the defendant, and the defendant agreed to buy from the plaintiffs, three shares, numbered respectively 1457, 1458, and 1459, of Rs. 10,000 each, in the Frere Land and Reclamation Company, Limited, upon which a sum of Rs. 4,000 per share had been then paid up, to be transferred as thereafter mentioned, subject, amongst others, to the following conditions:—(1) That the defendant should pay to the plaintiffs the said sum of Rs. 33,300 on or before the 1st of July 1865; (2) That on such payment, the plaintiffs should execute proper transfers, and do all things necessary on their part to transfer the said shares.

The case was heard before SAUSSE, C.J., in a Division Court on the 18th and 21st of November.

The Honourable J. S. White (Acting A. G.) and Marriott for the plaintiffs.

Taylor and Howard for the defendant.

The following issues were raised :—(1) Whether the plaintiffs were ready and willing to perform their part of the contract ; (2) Whether the contract was void as a wagering contract, within Act XXI. of 1848. No evidence was offered on the second issue. That on the first is referred to (so far as material) in the judgment.

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Cur. adv. vult.

SAUSSE, C.J. :—This is a suit to recover Rs. 33,300, as damages for breach of a contract, dated the 12th of January 1865, by which the defendant purchased three shares, numbered respectively 1457, 1458, 1459, in the Frere Land Reclamation Company, from the plaintiffs, for the above sum, which was to be paid by the defendant, on or before the 1st of July following ; and “ on payment ” the plaintiffs, as vendors, agreed “ to execute proper transfers, and do all such things necessary on their part to transfer the shares thereby agreed to be sold, and also such new shares (if any) to the purchaser ; all expenses attending the preparation, stamping, and execution of such transfers, and of getting the said shares transferred into the name of the purchaser, in the books of the Frere Land Reclamation Company, Limited, to be borne by the vendors.”

There were two issues raised : (1) whether the plaintiffs were ready and willing to complete their part of the contract ; (2) whether the contract was void as a wagering contract, within Act XXI. of 1848. Upon the latter issue the defendant offered no evidence, and withdrew it from the consideration of the Court : so that the only question is, whether the plaintiffs were ready and willing to perform their part of the contract.

The plaintiffs insisted that, by the form of the agreement, the defendant's promise to pay on or before the 1st of July 1865, was a separate and independent covenant ; and that, as it was admitted the money had not been paid upon that day, the plaintiffs, without proof of their being ready and willing to transfer the shares, were entitled to call for a decree. I considered at the trial that the covenants were

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concurrent, and that a transfer of the shares and the payment of the purchase-money should be concurrent acts. The intention of the parties at the time of entering into the contract is, in my opinion, amply demonstrated by the plaintiffs' own acts upon the 1st of July, when they made a tender of the documents subsequently mentioned, prior to a demand of payment.

It was proved that the plaintiffs, after previous notice on the 1st of June, had, upon the 1st of July, tendered to the defendant in person three share allotment and receipt papers in the Frere Land Reclamation Company, respectively numbered as in the agreement, and together with each a transfer paper and an application paper, both signed in blank by the original allottee, who was one A'tmáram Bálkrishna. The defendant received these papers, and, having taken a note of the contents of each, then returned them to the plaintiffs' messengers, who, upon the defendant's having received them, demanded payment of the stipulated price, but which the latter refused to pay. The plaintiffs were not the beneficial owners of those shares, but had entered into the contract at the desire of a constituent, who had, previously to their doing so, handed to them the allotment papers, which remained in their possession continuously down to the period of tender. It appeared that the Frere Land Company had not opened any book for the register or transfer of shares prior to the 28th of June, and between that date and the 1st of July forty-five shares only were registered or transferred, out of an issue of two thousand. These scrip or allotment papers, including a receipt for the first deposit call, were currently sold in the market of Bombay, and passed under the name of shares. The secretary of the Frere Company proved that, upon production at their office of the allotment paper, and of the transfer and application papers, which were handed to the defendant, a transfer of the shares of the allottee would, according to the usage of the company, have been made, as a matter of course, to the defendant.

Upon this evidence the plaintiffs rested their proof of the issue of ready and willing to transfer the shares. The

defendant objected : (1) that the contract had not been fulfilled, as the plaintiffs were not the beneficial owners of the allotment papers tendered ; (2) that shares were contracted to be delivered, and that allotment papers only were tendered ; (3) that, the approval of the directors of the company not having been obtained at the time of the tender, the plaintiffs were not legally ready to complete the contract, nor had there been a sufficient tender.

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I do not think the first objection can prevail. The substance of the contract was, that the plaintiffs were, in consideration of a certain sum, to put the defendant into possession, as legal owner, of certain numbered shares, on or before the 1st of July ; and if the plaintiffs did that, it was wholly immaterial to the defendant whether the plaintiffs were owners or not. He would have obtained what he had contracted for.

The second objection—that the plaintiffs contracted to deliver shares, but only tendered allotment and other papers—is equally untenable. Taking the substance of the contract to be, that the plaintiffs were to constitute the defendant legal owner of these three shares, on or before the first of July, the only inquiry upon this issue is, whether the plaintiffs had in their power the means of doing so, and if they had, whether they were willing to employ those means for that purpose. It is clear, upon the evidence, that when the plaintiffs had in their possession the original allotment and receipt papers, and had also a transfer and an application paper, both executed by the original allottee in blank, they had it in their power to have had the shares, to which that allottee was undoubtedly entitled, transferred to the name of the defendant, or of any one else. These documents, according to the usage of the company, were a full equivalent for a certificate of shares in the name of the original allottee ; and, had the defendant executed the transfer, would have enabled and entitled the plaintiffs to to have had the stipulated shares transferred into the defendant's name, and thus to constitute the latter the legal owner of those shares.

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Had these scrip or allotment papers been called in by the Frere Company, under any form in their Deed of Association, in consequence of transfer books having been opened; and had any difficulty been thus created, by the plaintiffs not having had them exchanged for certificates of shares, there might possibly be some foundation for the objection; but the evidence is clear that nothing of the kind was done, and that no difficulty whatever existed in procuring the necessary transfer upon similar documents. It is also clear that the plaintiffs were willing to employ all the means at their disposal to effect the completion of the contract.

In the third objection I thought at first that there was a good deal of force: because, without the previous sanction of the directors, no transfer could be made or enforced; and such sanction was not procured by the plaintiffs in this case; but, upon consideration, I have come to the conclusion that the defendant cannot be allowed to rely upon this objection. The approval of the directors could not be obtained, nor even sought for, according to the rules of the company, without the transfer paper having been executed by the transferee, as well as by the transferor. The defendant, as transferee, must, on the evidence, be taken to have refused to execute the transfer; and he cannot be allowed to rely upon an alleged inferiority in title, which has been occasioned by his own refusal to perform an act, necessary to make it good, and lying within the scope of his duty under the contract.

All persons dealing in the shares of any joint stock company, must be considered to do so, subject to its lawful rules and usages. The plaintiffs had only stipulated to do all things necessary on their part to transfer the shares. They had no power to compel the defendant to execute the transfer, without which the application for approval by the directors could not be received by the company; and thus, by that refusal, he rendered it impossible, according to the rules of the company, that this approval could have been obtained. If he had executed the transfer, and thereby placed the plaintiffs in a position to ask for the approval, he might have been able to raise the question contained in this

objection. But not having done so, it is not competent for him now to rely upon it. This objection also fails, so that the offer made by the plaintiffs on the 1st of July was a sufficient performance, on their part, of the contract, to entitle them to call upon the defendant to pay the amount he had contracted to give for those three shares.

In expressing my opinion upon the sufficiency of this so-called tender by the plaintiffs, I wish to guard against my being supposed to hold that a formal tender is necessary to be proved, to entitle a plaintiff to recover under an issue of "ready and willing to deliver." There are several authorities the other way; and the case of *Shaw v. Rowley* (a) clearly decides that, if a plaintiff was as ready to perform what he contracted for as he could be, it is sufficient. In that case, the objection relied upon was, that a call remained unpaid, at the due date for taking delivery of the shares purchased by the defendant, and that no share could be transferred without the previous payment of that call. But, upon it appearing that the defendant was bound to recoup the plaintiff of any call which he should have paid before delivery of the shares, the Court of Exchequer held that, as the defendant was the party ultimately bound to pay, he could not be allowed to interpose such an objection to the fulfilment of his contract. *Pollock, C. B.*, says, in delivering the judgment of the Court:—"It was not necessary that the plaintiffs should be in an actual situation to perform their contract, if they were able at the proper time to place themselves in that situation;" and further on he says:—"It appears to us, therefore, that the defendants cannot now set up the mere impediment that arises out of the non-payment of the call, for it is agreed on all hands that it was ultimately to be paid by the defendants."

Again in *Stray v. Russell* (b), where a somewhat similar question respecting approval of a transferee arose, but where the position of the parties to the suit was reversed, Mr. Justice *Hill*, in his very able judgment, says:—"If the plaintiff were desirous that the transfer should be completed

(a) 16 M. & W., 810.

(b) 1 *Law Times*, p. 162; 28 *Law J.*, Q. B. 288; 1 E. & R. 388.

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and his title perfected, it was his duty to execute the transfers, and leave them with the then existing certificates at the bank for registration. If he had done so, and the bank had unqualifiedly refused to permit the transfer, the plaintiff might be in a position to raise the question he has submitted to the court. As the facts, however, stand, he himself is in default in obtaining the completion of the transfer; and he cannot be permitted to say that the consideration has wholly failed, when the failure, if such there be, rests upon the default of himself, and not upon any omission or default of the defendant. It is not shown that the defendant was guilty of any neglect or omission of any act required to be done by him to complete the contract on his part." That case was affirmed, upon appeal, in the Exchequer Chamber in 1860, where *Williams, J.*, delivering the judgment of that court, says—"We think that at most the vendor was to obtain the consent of the directors to the transfer, only in the usual way and by the usual means."

So, in this case, the defendant cannot be allowed to set up the want of approval by the directors, when he had refused to execute the transfer paper, which was not only a usual, but was also an essential, condition precedent to the application for approval being even entertained. The plaintiffs, by offering it, executed by the transferor, to the defendant for execution, performed their part of the contract in that respect.

The Court is not called upon to express any opinion upon how far the facts of this case would otherwise bring it within the scope of the decision in *Wilkinson v. Lloyd (c)*, which has been relied upon, or within that of the more recent case of *Poole v. Middleton*, decided at the Rolls, in 1861 (*d*). In the present case, the issue of whether the agreement was a wagering contract was withdrawn from my consideration; and, without expressing any opinion one way or the other, I wish to feel myself perfectly free to consider any such case, unembarrassed by the present decision.

Judgment for plaintiffs, with costs.

(c) 7 Q. B., 27.

(d) W. R., 758.