

JI'VRA'J MEGJI *et al.* v. POULTON.*Suit No. 772 of 1866.*1865.
Dec. 22.*Sale of Shares for future delivery—Readiness and Willingness—
Specific Performance.*

Plaintiff contracted with defendant to sell him 250 shares in the Alliance Financial Corporation, and 10 shares in the Mazagon Reclamation Company, delivery to be made at defendant's option within six months from date of contract, and cash to be paid on due delivery to defendant or his order. On the last day for delivery, plaintiffs produced allotment receipt papers, all bearing date prior to the date of the contract, for the number of shares contracted to be sold in both companies. The Alliance Financial papers were indorsed by the original allottees; but neither transfers, nor applications for transfers, signed by the original allottees, were offered, nor had any such been executed, although the corporation had opened transfer books long before. Of the Mazagon Reclamation receipts, nine were indorsed by the allottees, one had no indorsement, and over the allottee of it and of another receipt, plaintiffs had no power to enforce delivery. The Mazagon Reclamation Company had not opened transfer books until long after the last day of delivery. On the issue, whether plaintiffs were ready and willing to deliver the shares:—*Held*, as to the Alliance Financial shares, that plaintiffs, not being in a position to have constituted defendant owner thereof, must fail in their suit with respect to them; and as to the Mazagon Reclamation shares, that, although plaintiffs had done all they were required to do, by the usage of the market, to transfer the interest in eight of them, yet, the contract being an entire one, they must fail in respect to them also.

If a party, bound to do an act upon request, is ready to do it when required, he will perform his part of the contract; although he might happen not to have been ready, had he been called upon at some anterior period. 206

THIS suit was heard before Sir M. R. SAUSSE, C.J., in a Division Court, on the 27th and 28th of November.

The Honourable J. S. White and Marriott for the plaintiffs.

Howard and Green for the defendant.

The facts (so far as material) sufficiently appear in the judgment of his Lordship, which was this day read by Mr. Justice COUCH.

JUDGMENT :—This is a suit for specific performance of an agreement, entered into between the plaintiffs and the defendant, on the 2nd of December 1864, by which the latter purchased from the former 250 shares in the Alliance

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Financial Corporation, Limited, at the rate of 63½ per cent. premium per share ; and ten shares in the Mazagon Reclamation Company, Limited, at the rate of Rupees 9,700 premium per share : all calls &c. to be duly paid by the plaintiffs to date of delivery : delivery to be made at the defendant's option (that is, "as may be, or when, required or demanded by me"), at any time within six months from that date, viz., on or before the 2nd of June 1865 : "cash to be paid at the above rates, on due delivery to me or my order : and the scrip for the Alliance Financials to be in small parcels, that is, no single scrip to represent more than 25 shares."

The only issue raised was : whether the plaintiffs were ready and willing to deliver the shares, according to the true meaning and effect of the agreement of the 2nd of December 1864.

On the 30th of May the plaintiffs wrote to the defendant to take delivery of the shares ; and on the 1st of June the defendant replied, through his attorneys : requesting the plaintiffs to attend the next day at their office with the shares ready to be transferred, and asking for a list of the shares and their numbers, in order to enable them to prepare the necessary transfers. On the 2nd of June the plaintiffs' attorney, in reply, stated that allotment papers and receipts for the calls paid would be tendered by a clerk that day ; and would be delivered upon payment of Rs. 2,15,250 under the agreement ; and further mentioned that the application for the necessary transfers had not been "got ready," owing to the plaintiffs not being aware that the transfer books of those companies were opened ; but offering to allow any expenses to be deducted from the above amount. At this period the shares in these two companies had fallen to par.

The Alliance Financial Corporation had in fact opened books for transfer, on the 4th of April ; but the Mazagon Land Company had not been registered as a joint stock company until May, nor had it opened any transfer books until the 29th of June, long after the last day for delivery.

On the 2nd of June eight receipts for first calls or "scrip" in the Mazagon Company, and made out in the name of one

Tárachand Jethá, were produced, on behalf of the plaintiffs, to the defendant's solicitors. Of these four were presented with indorsements in that name; and four had no indorsement at all, but, on objection being made, were indorsed by a person present, who was stated to be Tárachand Jethá. Two other receipts were also produced, of which one had an indorsement. The other had none; but was accompanied by a letter of allotment to the person mentioned in the receipt. These ten allotment receipts all bore date in, or prior to, December 1864. An objection was made that none of these documents were stamped; but on the part of the plaintiffs it was insisted that they did not require stamps.

The Alliance Corporation allotment receipt papers, all bearing date in October 1864, were indorsed by the original allottee; but no transfer or application for transfer-paper was offered, or was in fact then executed, by him.

The defendant refused to accept these documents, as a fulfilment by the plaintiff of delivery, under his contract. All the allotment papers offered in both companies had been borrowed by the plaintiffs from a friend, who came with them, and with whom the plaintiffs were to have come to an understanding, if the shares had been taken delivery of by the defendant. The plaintiff had in his possession the shares he had contracted to deliver, "when he entered into the agreement in December 1864; but he very soon after mortgaged them to a bank, which, as the plaintiff alleged, refused to carry out, on the 2nd of June, an agreement to let out the shares for tender on that day.

It was contended by the counsel for the defendant, at the trial, that the plaintiff was not "ready and willing," as he had not the shares in his possession, continuously from the date of the contract until tender upon the 2nd of June; and *Dixon v. Clark (a)* was relied upon as an authority that the plaintiff must fail, if he cannot show that he was at all times, during the six months, ready to perform his contract, whether called upon to do so or not. *Dixon v. Clark* only decides that, if performance was demanded and refused at

(a) 5 C. B. 365.

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any time a party in the position of the defendant here had a right to make such a demand, then the issue of readiness should be found against the party who had to maintain it. If a party, bound to do an act upon request, is ready to do it when it is required, he will fully perform his part of the contract; although he might happen not to have been ready, had he been called upon at some anterior period.

I do not think that any objection, upon the ground of want of stamp, applies to the eight Mazagon shares, which were allotted to Tárachand Jethá; and which were by him indorsed, for the first time, upon the 2nd of June, for the purpose of direct transfer from himself to the defendant. Any such question might arise upon another share, which appeared to have been indorsed previously by the allottee, and which had got into the hands of a third person, who offered it to the defendant; but I do not think it material to express any opinion upon that point, as I decide the case on other grounds. The tenth Mazagon allotment paper had no indorsement whatever, and it did not appear that the plaintiff had any power over, or knowledge of, the allottees, in these two latter allotment papers.

Now, the nature of a contract like the present is this, that, whenever called upon by the purchaser, within the stipulated period, the seller shall be ready to make such a delivery of the shares, and place the purchaser in such a position with reference to them, as shall enable the latter to go into the market and become himself a seller, under such circumstances as would enable him to compel a purchaser from himself to specifically fulfil his contract.

Was the defendant placed in such a position by the plaintiff on that 2nd of June with reference to all these shares? I think he was not so placed with reference to the latter two shares or allotment papers. As to eight allotment papers, they were proved to have been indorsed by the original allottee; and, as no transfer books were then opened by the Mazagon Company, I think the plaintiff, through Tárachand Jethá, did all that he was required, by the usage of the mar-

ket, to transfer the interest in these shares, according to what was in the contemplation of the parties in December 1864, when such allotment papers and scrip were clearly what was contracted for, until registry and transfer books should be opened by the Company.

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With respect to the Alliance Financial Company's shares, although the company had opened their transfer books on the 4th of April, yet nothing beyond allotment papers, indorsed by the original allottee, were offered on the 2nd of June. No transfer, nor application for transfer paper, was offered to the defendant: nor had the plaintiff any such, signed by the original allottee, in his possession; neither was the scrip itself in his possession or under his control. The allottee and owner, until he had executed the transfer and the application papers, and had given them to the defendant or to the plaintiff, had it in his power to decline to complete the contract, which the plaintiff had entered into; and the plaintiff had no other means of completing his contract. That allottee did not offer to the defendant, on behalf of the plaintiff, documents sufficient to enable the defendant to constitute himself owner of those shares in the books of the company.

I do not think that, under these circumstances, the plaintiff can be considered to have been in the full and plenary position of being able to have constituted the defendant the owner of those shares, and he must fail to this extent, upon the issue of readiness to complete his contract. When the plaintiff has failed in completing far the larger portion of his contract, I do not think that I can make a decree for the premium upon the eight Mazagon shares, which were, I think, sufficiently delivered within its meaning, and for which I would have given a decree, if I had thought the contract could be so far divided.

The defendant has, I regret to say, successfully evaded the completion of this contract; and my decree in his favour is without costs.

Judgment for defendant.