CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Suit No. 777 *of* 1865.

THE ORIENTAL FINANCIAL ASSOCIATION (LIMITED)

v.

THE MERCANTILE CREDIT AND FINANCIAL ASSOCIATION (LIMITED).

Sale of Shares and repurchase for future delivery—Forfeiture—Liability of Company for acts of Directors.

In January 1865, the plaintiffs purchased from the defendants 2,000 shares in the defendants' Company, at 15 per cent. premium, for which they paid in cash Rs. 3,20,000; and the defendants simultaneously agreed to repurchase for future delivery and payment at a fixed time in July the same 2,000 shares at 29½ per cent. premium. The contracts for the repurchase were signed by three directors of the defendants' Company, and on each was a memorandum, initialed by two of them, referring to a list of the "share receipts" delivered, with the words, "We are duly to examine and receive the same at the fixed time." 190 letters of allotment, in the names of several persons and for various numbers of shares, endorsed by the original allottees, and initialed by one of the three directors, were, together with receipts for the first call, handed over to the persons who acted for the plaintiffs, by the three directors of the defendants' Company who made the contracts.

In April the defendants' Company made a fresh call payable on the 4th of May. A list of the names and addresses of the original allottees of what were called "shares in the market," (*i. e.* other than those purchased by the Company itself *for cash*, or held by it on mortgage) was made out from the deed of settlement, and notices of forfeiture for non-payment of the call were sent by post. The original holders of the 190 letters of allotment were included in the list; but no notice was sent to the plaintiffs. On the 27th of May all shares upon which the 2nd call was not paid were declared to be forfeited for the benefit of the Company. The defendants' Company, as stated in the Memorandum of Association, was established, among other objects, for "the purchase and sale of Debentures, Stocks, Shares of Joint Stock Companies (including the shares of this Company), and other Securities, the making Loans and Advances on such Securities as the Directors of the Company may think fit."

Held that the contracts for the repurchase of the 2,000 shares, being within the scope of the authority of the directors, the defendants were bound by them; that the defendants were bound to treat the plaintiffs as the holders of those shares, and to give them the notice required by the Articles of Association, and that they were not at liberty to give that notice to the original allottees, who by the admission of the defendants testified by the acts of their agents in making the contracts, had parted with the shares; that the shares were, consequently, not legally forfeited, and the defendants having refused to accept them, and they being then unsaleable, the plaintiffs were entitled to recover the full price as damages.

March, 23, 24, 26, April 5.
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THIS was a suit to recover Rs. 4,36,000, the price of shares, which the defendants refused to accept.

On the 18th of November 1865, judgment by default for non-appearance was passed against the plaintiffs, which was afterwards (3rd Feb.) set aside under Sec. 119 of Act VIII. of 1859, and the suit ordered to be proceeded with (*a*).

Bayley, McCulloch and *Macpherson* for the plaintiffs.

The Hon'ble J. S. White, (Acting Advocate General) Howard and *Green* for the defendants.

The facts sufficiently appear in the judgment.

Cur. adv. vult.

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COUCH, C. J.—The plaint in this suit stated that, on or about the 3rd of January 1865, the plaintiffs purchased from the defendants, and the defendants sold to the plaintiffs, 2,000 shares in the Mercantile Credit and Financial Association at the rate of Rs. 15 per cent. premium, and the plaintiffs paid to the defendants rupees three lacs and twenty thousand for the same; and that the defendants, simultaneously with the abovementioned sale, agreed to re-purchase from the plaintiffs the same 2,000 shares at the rate of Rs. 29½ per cent. premium, to be delivered and paid for between the 1st and 15th days of July then next ensuing; and two agreements in the Guzeráthí language and character, bearing date the 3rd of January 1865, and respectively signed by the duly authorized agents of the defendants in that behalf, each agreement being for one thousand shares, were executed for the purpose of carrying out the last mentioned contract; and that the defendants refused to take

(*a*) 2 Bom. H. C. Rep. 282.

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delivery of the shares; and claimed as damages rupees four lacs and thirty-six thousand.

On the 29th of September 1865, the following issues were settled:—(1) Whether the defendants agreed to purchase from the plaintiffs the 2,000 shares mentioned in the plaint; (2) whether the plaintiffs were ready and willing to perform their part of the agreement; (3) whether the plaintiffs sold the shares before the expiration of the time fixed for the delivery, and thereby lost their right to sue the defendants for the breach of the contract; (4) whether the contract was a contract by way of gaming and wagering contrary to Act XXI. of 1848; and the substantial questions raised at the hearing between the parties were, whether the defendants were bound by the contracts which had been signed by three of their directors on behalf of the Company; and whether the shares had, before the time for delivery, been legally forfeited for non-payment of a call, and the plaintiffs thereby rendered incapable of performing the contract.

The contracts were signed by C. F. Heycock, Vináyak Pándúrang, and Lalubhái Máneklal, three of the directors of the defendants' Company, and were as stated in the plaint; and on the back of one of them was the following memorandum:—"Having signed, you have delivered to us a list of the 'share' receipts. We are to receive the receipts in accordance therewith. We are duly to receive the same after examining them with the initials which have been made thereon. We are duly to examine and receive the same at the fixed time of July;" and on the other a similar memorandum, except that the words "after examining them" were omitted before the words "with the initials;" each memorandum having to it the initials L. M. and V. P. The list referred to in these memoranda, and a number of letters of allotment of, and receipts for the first call of Rs. 100 on shares in the Mercantile Credit and Financial Association, bearing the initials V. P., were produced at the hearing. These letters of allotment were 190 in number, and were in the names of many different persons and for various num-

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bers of shares. At the time of the transaction a cheque was given into the hands of Vináyak Pándúrang for Rs. 3,20,000, drawn upon the Asiatic Banking Corporation by three of the directors of the plaintiffs' Company, and payable to the Mercantile Credit and Financial Association, which was presented for payment on the 7th of January 1865, and the amount was then placed to an account which was opened by the Asiatic Banking Corporation in the names of C. F. Heycock and Vináyak Pándúrang. The defendants' Company had no account with the Asiatic Banking Corporation.

In the 3rd clause of the Memorandum of Association of the defendants' Company it is stated that the objects for which the Company was established were, "the purchase and sale of Debentures, Stocks, Shares in Joint Stock Companies, (including the shares of this Company,) and other Securities, the making Loans and Advances on such Securities as the Directors of the Company may think fit."

It was contended for the defendants that the contracts were made by the directors in fraud of the shareholders, and could not be enforced against the Company. I think it may be taken upon the evidence to be the fact, that the proceeds of the cheque for Rs. 3,20,000, which were placed to the account of C. F. Heycock and Vináyak Pándúrang, were not made use of for the benefit of the shareholders, but were applied for the private purposes of those persons and Lalubhái Máneklal; and that a fraud was practised upon the shareholders, either by shares which were the property of the Mercantile Credit and Financial Association being sold by the three directors who signed the contracts, and the produce of the sale being misapplied, or by the Company's name being used by those directors in selling shares which really belonged to themselves, and had been either originally allotted to them and the other promoters of the Company in the names of other persons, or had been purchased by them; but Issá Ahmed, one of the directors of the plaintiffs' Company, who was called as a witness, said he took part in the arrangement of the contract and negotiated with the broker and Lalubhái and Vináyak; and that they represented to him that they were contracting on behalf of the Mercantile Credit

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and Financial Association, and that the shares belonged to the Association; that they did not tell him why they wanted him to buy the shares, nor did the brokers tell him they had a scheme for raising the price of the shares.

Now, there was no necessity for the directors of the defendants' Company, who made the contracts, to acquaint the persons who contracted with them on behalf of the plaintiffs of their views or intentions; and I think the probability is in favour of their not having done so. And if, as is probable, the intention was to raise the price of the shares, I think that the shareholders, who had by the Memorandum of Association authorized the dealing in the shares of the Company, cannot avoid the contract, unless it appears that the contract was not intended to be a real one; and that the parties to it conspired together to impose upon the public, and make it appear that the shares were of greater value than they really were. Such a case as this is not proved by the evidence given in the suit; and I think that, these contracts being within the scope of the authority of the directors, the defendants are bound by them. It, therefore, becomes necessary to consider, whether the shares had become forfeited before the time fixed for the delivery.

By Clause 35 of the Articles of Association it is provided that "If any shareholder fails to pay any call due on the appointed day, the Board may at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call, together with any interest and expenses that may have accrued by reason of such non-payment. The notice shall name a future day (not being less than fourteen days from the date of the notice) on or before which such call, interest, and expenses are to be paid; it shall also name the place where such payment is to be made, the place so named being either the Registered Office of the Company, or some other place at which calls of the Company are usually made payable. It shall also state that, in the event of non-payment of such call, interest, and expenses at or before the time and at the place appointed, the shares in respect of which such call was made

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will be liable to be forfeited." And by Clause 36, "If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter, before payment of all calls, interest and expenses due in respect of such share has been made, be forfeited by a resolution of the Board to that effect."

It was proved by Mr. Weatherhead, the Manager of the Mercantile Credit and Financial Association, that on the 10th of April 1865 a resolution was made by the Board of Directors, that a call of Rs. 150 per share should be made, which was advertised in the *Times of India* and *Bombay Gazette* newspapers, and two native newspapers, the *Bombay Sumáchár* and *Dnyán-bodak*, all published on the 12th of April, the 4th of May being the day appointed for payment; that the call continued to be advertised till the 5th of May, on which day, by order of the directors, he sent notices to the shareholders. The manner in which this was done, he said, was that he had a list made out of what he calls shares in the market, which were the shares other than those which the Company had purchased for cash, or had taken by way of mortgage. This list contained the names of the parties to whom allotment letters were made out; and notices of forfeiture were made out for every name in that list. A copy of the names and addresses of the allottees was made from the deed of settlement by a clerk of Mr. Leathes, the solicitor of the Company (but who was not called as a witness, nor was the copy proved to be correct); and the addresses were copied from this list, and Mr. Weatherhead checked the names from the list which he had made, which did not contain the addresses; and the notices were taken to the post office by a peon in the defendants' service.

On the 27th of May, a resolution was passed by the Board of Directors, that all the shares in the names of the allottees, in respect of which the second call of Rs. 150 per share had not that day been paid, were declared to be forfeited for the benefit of the Company. Each of the share papers referred to in the memoranda, on the back of the contracts of which the list was made, and which bore the initials V. P. as I have

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stated, had on the back of it a signature which purported to be the signature of the allottee, and was in that state at the time the contracts were made, and had been delivered in that state to the persons, who acted on behalf of the plaintiffs, by the directors of the defendants' Company, who made the contracts. Under these circumstances I think the defendants were bound to treat the plaintiffs as the holders of these shares, and to give to them the notice required by the 35th clause; and were not at liberty to give the notice to the original allottees, who had, by the admission of the defendants testified by the acts of their agents in making the contracts, parted with the shares.

Sections 14 and 15 of Act XIX. of 1857, as well as Clause 13 of the Articles of Association, require a register to be kept by the Company, in which shall be entered the names, addresses, and occupations of the holders of shares. Mr. Weatherhead said there was a register of the Company when he became the manager, which was on the 8th of February 1865; but that this was not such a register as the law required, may be inferred from the statements of Mr. Mayhew, one of the directors of the defendants' Company, who was examined as a witness for them, and who said that the object of the call was to meet the liabilities of the Company, and also to force the holders of allotments to come forward and be placed on the register; as well as from the fact that the addresses to the notices were taken from the deed of settlement. If what Mr. Mayhew states was *bonâ fide* the object of the call, the obvious course would have been to serve the notice upon the plaintiffs, who were precluded by their contracts from denying that they were the holders of these shares; and their name might also, I think, have been entered in the register.

The defendants relied upon Clause 134 of their Articles of Association, which provides that "Every Shareholder shall from time to time leave at the Registered Office of the Company an address somewhere in the Island of Bombay, giving the name of the street and the number of the house, if any, and all Summons, Notices, or other Documents sent through

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the Post Office to or left at the last registered address of each Shareholder shall be deemed to have been well served on the Shareholder giving such address, and in case of any Shareholder neglecting to give such address it shall not be competent for him to object to any act or proceeding of the Company on the ground merely that due notice thereof was not sent to him." But I think it does not apply to this case. Granting that the address given in the Articles of Association may be considered as an address left at the registered office of the Company by a shareholder within its meaning, still the persons who signed the articles and whose addresses were given, were not, as regards these shares, shareholders at the time the call was made, nor were the defendants entitled to treat them as shareholders. The defendants are relying upon a forfeiture, under circumstances which render it more than ordinarily incumbent upon them to show that the provisions of the Articles of Association, enabling them to forfeit the shares, were strictly complied with; and I think they have failed to do this. Without, therefore, giving an opinion as to whether the call was made *bonâ fide*, upon which I think the evidence is not sufficient to enable me to decide, I must declare that the shares were not legally forfeited.

It was contended, but as it appeared to me somewhat faintly, for the defendants, that the plaintiffs ought to have got transfers from the allottees before the 1st of July; but the memoranda, which must be taken to form part of the contract, show that this was not the intention of the parties. The contract cannot be regarded as one for a strictly legal transfer of the shares, but rather for a transfer of the title to them contained in the allotments and receipts for the first call.

The shares not having been legally forfeited, the plaintiffs were able and ready and willing to do all that they were bound to do by the contract; and it being proved that at the time the defendants refused to accept the shares they were unsaleable, they are entitled to recover the full price as damages. I, therefore, find the issues for the plaintiffs, and give judgment in their favour for Rs. 4,36,000 and costs.

Judgment for Plaintiffs.