Original Suit No. 828 *of* 1865; *Appeal No.* 45.

MAGANBHA'I HEMCHAND.....*Plaintiff and Appellant.*
MANCHHA'BHA'I KALLIA'NCHAND, *Defendant and Respondent.*

Sale of Shares for future delivery—Readiness and willingness—Act XIX. of 1857, *Secs.* 18 *and* 19—*Omission to try issue—Remand.*

In a suit to recover damages for the non-acceptance of shares, where the vendor had contracted to execute proper transfers, and do all other things necessary on his part to transfer the shares, and to bear the expense of such transfer:—

Held on the issue—whether the plaintiff was ready and willing to perform his part of the contract—that it was sufficient to show that he had in his possession, at the time fixed for the performance of the contract on his part, such certificates of the shares contracted to be sold as were required by the law, and that he tendered the same with a deed of transfer to the purchaser; and that it was not necessary for the vendor, before handing over the documents to the purchaser, to effect the transfer; but that it was the duty of the purchaser himself, in such case, having accepted the shares, to have the transfer made into his name in the books of the company.

The finding of the court below on the first issue being, therefore, reversed; the suit was remanded for trial of the issue—whether the contract was a wagering one—the Judge having omitted to determine that, and the defendant not having given evidence upon it, in consequence on the first issue being found for him on the evidence given by the plaintiff.

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APPEAL from the decision of Mr. Justice ANSTEY.

The Original Suit was tried in a Division Court on the 18th and 19th of December 1865, when judgment was given for the defendant.

The Advocate General (*Hon'ble L. H. Bayley*), in opening the case for the appellant, plaintiff in the original suit, stated that he was the vendor of two shares in the Mazagon Reclamation Company which were contracted to be delivered to the defendant on the 1st of July; the contract containing a provision that, in the event of the purchaser not accepting delivery on the date specified, the vendor should have the option of selling the shares on his account, which he did, and the defendant was sued for the difference between the price at which the shares were sold and the contract price. The defence set up was a failure on the part of the vendor to complete his part of the contract at the appointed time, and the

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provisions of the Wagering Act. There were two contracts sued upon, the first of which did not specify any particular share, and was simply for the purchase and sale of a share in the Mazagon Reclamation Company; the second related to a particular share, the number of which was inserted in the contract. It was proved that when the contracts were entered into, there only existed what was known as scrip, representing the shares of the company, and that the books of the company were not opened until the 29th of June; and also that the plaintiff was on the 1st of July possessed of two shares, one of them being the particular share mentioned in the second contract; and that he tendered these shares with all the title procurable at the time for the defendant's acceptance.

The learned Judge who heard the case seemed to think that the plaintiff was bound to supply a full and valid title to the shares contracted for at the time agreed upon, otherwise the action must fail; and he was of opinion that no such title could be shown on the 1st of July—there being no proper register of shareholders or transfer books kept by the company up to the end of June, and the only book produced purporting to be such a register being what was called a "stock ledger." The Judge quoted *Humble* v. *Langston* and several of the old South Sea cases, which were not applicable to the case. A witness who acted on behalf of the defendant stated that he did not remember what the documents were which were tendered on behalf of the plaintiff, but that the stamp was objected to as insufficient, and on this account the shares were rejected. The learned Judge added that the law of England was in accordance with his view of the case, as was shown by the decisions he quoted, and that there was nothing in the climate or the colour of the inhabitants of Bombay to warrant a different interpretation of that law here to that which had been put upon it in England for the last hundred years. The neglect of the company to keep books, as they were naturally expected to do, and the neglect of the plaintiff to take the unusual course of suing out a *mandamus* against them to compel

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them to do so, was (the Judge said) fatal to his case, and he must, therefore, suffer the loss which resulted from such neglect.

The Advocate General went on to state that the evidence of the plaintiff's munim showed that he had in his possession, on the 29th of June, letters of allotment relating to five shares in the Mazagon Company, and that he exchanged these for share certificates between that date and the 1st of July, when he offered, in the presence of Mr. Tyabji's clerk, two of the certificates to the defendant for acceptance, and they were refused, not because they were not the proper documents, but because the stamp was insufficient, a defect which he offered to remedy at once. There was no question raised as to the validity of the documents, and the only discrepancy in the evidence occurred with regard to the place at which the tender was made, one of the witnesses saying it was at the house of the defendant, and another that it was at another house a short distance from it. [COUCH, C. J.:—Then you tendered share certificates, not scrip, for the shares mentioned in the contract.] Yes. The five letters of allotment which the plaintiff held were produced in court by the clerk of the company, to whom they had been returned in exchange for share certificates such as were to be had at the time. These were, it had been shown in evidence, considered as shares, and treated as such in the market at the time. They were not produced in court, having been sold by the plaintiff; but the fact of the production of the letters of allotment by the company proved that certificates had been issued in respect of those letters. The requisite tender had been made with all the title procurable at the time. [The Advocate General here read extracts from the evidence.] There was no evidence called to rebut this testimony, and no cross-examination took place as to the nature of the documents tendered, which were only required by the Act to be documents bearing the common seal of the company, and stating that the plaintiff was the holder of so many shares, and there was sufficient evidence to prove that the requirements of

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the law had been complied with. [Here it turned out that the evidence of the company's clerk had been cancelled by the Judge, in consequence of his stating that the book was the stock ledger, and of Mr. Howard's saying that he did not intend to put it in evidence. Their lordships remarked that the Judge had no right to cancel this evidence. Being evidence of the contents of a document which was not in evidence, its reception might have been objected to; but having been received, it could not be cancelled.]

Howard, on the same side, contended that the burden of proof, that the title was an invalid one, lay with the defence; and as the defendant shirked the witness-box, that circumstance would weigh with the Court, which would not require so strict a proof of valid title under such circumstances, as where evidence had been called to rebut the title, there being in this instance not even cross-examination against it.

Pigot, for the respondents, contended that there was no proof of the things tendered being what was specified in the contract, and that such proof was essential to the plaintiff's case. There was the evidence of the plaintiff's munim to show that he had in his possession on the day in question only five Mazagon shares, two of which belonged to customers, one to another person whose name he gave, and another to himself as distinguished from his master; thus leaving him in possession of only one share of the five wherewith to fulfil a contract which was for two shares.

COUCH, C. J.:—There was no proof that he had not power to sell any of the other shares, and no cross-examination on the point.

Hayllar, on the same side:—One of the issues raised was whether the contracts were null and void under the provisions of the Wagering Act, a point which was barely mentioned at the hearing, as the learned Judge expressed himself so

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strongly in our favour on the point of readiness and willingness, that we thought it unnecessary to take up his Lordship's time by going into evidence on the second issue. [COUCH, C. J.:—The result shows that it does not always shorten cases of this kind to refrain from going into the whole of the evidence. Do you contend that there was sufficient evidence before the Court to find on the issue raised under the Wagering Act ?] We could hardly contend that, as it would be unfair to the opposite side to deprive them of the opportunity of cross-examining on the point, but if the Court thinks that there was sufficient evidence on the first issue to warrant a finding for the plaintiff, we should ask it to consider whether there was not sufficient evidence on the learned Judge's notes to justify it in calling from the defendant for further evidence on the second issue, under Sec. 355 of the Code. The issue was not abandoned at the trial, and was not pressed, simply on account of the strong expression of opinion on the part of the learned Judge, and we should, therefore, ask the Court either to send the case back for further evidence on that issue, or to hear such evidence itself.

COUCH, C. J.:—Section 354 gives the Court the power of sending the case back if the Judge below has omitted to determine an issue.

The Advocate General in reply:—It appeared to me that the point was abandoned. [COUCH, C. J.:—On the contrary it appears to have been mentioned by Mr. White.] If the company broke the law, by not keeping a register, a contingency that could not enter into the minds of the contracting parties, they were amenable to the law for their neglect, and that neglect ought not to be allowed to operate to the prejudice of others in the position of the plaintiff, who had done, as had been shown, all that lay in his power to fulfil his part of the contract, and was only unable to put the name of the defendant on the register because no such register existed.

COUCH, C. J.:—In this case the learned Judge before whom the suit came for hearing framed three issues:—(1) whether

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the plaintiff was ready and willing to perform his part of the contracts, which formed the basis of the plaint, at the time fixed, viz., the 1st of July; (2) whether the contracts were null and void under the provisions of the Wagering Act; (3) whether the defendant was indebted as mentioned in paragraph 6 of the plaint. The second of these issues was not tried, and the third appeared to have been introduced with reference to earnest money, as stated to have been paid in the sixth paragraph of the plaint, and with reference to some accounts between the parties.

The material question for the determination of this court is, whether the first issue was properly found for the defendant. The allegation on the part of the plaintiff was that all was done by him which he was bound to do for the due fulfilment of his part of the contract, but that the defendant would not accept. The issue was—whether the plaintiff was ready and willing to perform his part of the contract. It appears to me that on the 1st of July, which was the time fixed by the contract for performance on the part of the vendor, he had in his possession such certificates as were required by the Act, and that these were of such shares as he was entitled to sell or make a transfer of; and the fact of these standing at that time in his name was *primâ facie* evidence of his title, according to the provisions of the Act, by which "the transferror shall be deemed to remain a holder until the name of the transferree is entered in the register book in respect thereof" (Act XIX. of 1857, Sec. 18); and, although the company had no transfer book, they had issued certificates which were *primâ facie* evidence of the vendor's title, and it had been shown that these were in his possession at the time fixed in the contract, and that he offered them for the acceptance of the defendant.

I do not think there is any evidence of the insufficiency of the stamps, there being no further proof than a remark made by one of the witnesses, which might or might not be well founded; and, if they were insufficient, that was a defect which might have been easily remedied, and it appears that the vendor offered to do this at the time. I, therefore, think

that no valid objection can be made to the tender on that ground.

The vendor appears to have had the necessary documents in his possession on the 1st of July, and to have been prepared to do all in his power to transfer the shares to the purchaser. It was important that the terms of the Act required that the transfer should be entered in the books of the company, and that the shares would remain in the name of the vendor till this was done. By the contracts the vendor agreed to do all things necessary on his part to enable the purchaser to effect the transfer, and to bear the expenses of it. The question, then, was, what was necessary to the transfer? Was it necessary only to execute a transfer deed, and to hand it over with the shares to the purchaser? or was it necessary to go further and enter the transfer in the books of the company before handing over the documents? To my mind there appears to be no doubt as to the law on this point, that where the vendor has transferred the shares to the purchaser, executed the deed of transfer, and delivered it over to the transferree, it becomes the duty of the latter to go to the office of the company and get the transfer made into his name.

The contracts in this case did not engage that the transfer should be executed by the vendor, but that he would render all the assistance in his power to get the transfer effected, and bear the expense of such transfer. The learned Judge below, however, appeared to think otherwise, and seemed to be of opinion that the vendor had engaged to get the transfer registered int he company's books, and that until this was done he would not have performed his part of the contract. If this were so I think that the vendor would be responsible for the performance of such a condition; but it appears to me that such were not the terms of the contract, and that the vendor was ready and willing to do all that he was required by it to do. There was no evidence to prove that he was not ready, if necessary, to join legal proceedings to compel the company to register the shares in the manner required by law, and he showed, by presenting the shares,

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that he was ready to perform his part of the contract. I think, therefore, that the issue should have been found for the plaintiff.

There was another point mentioned which I think ought to be noticed, viz., that the vendor was not in a position to transfer the shares before the 1st of July. If the vendor had been called on to transfer the shares, upon payment of the purchase money *before* the 1st of July, and had failed to do so, he would have broken his contract, and could not afterwards have enforced it. But if the purchaser allowed the whole of the time to elapse before making such a demand on the vendor, it was sufficient for the latter to show his readiness and willingness to perform his part of the contract *on* the 1st of July, and I think it was not necessary for him to show that he was in possession of the shares before that time.

On these grounds I am of opinion that the finding of the learned Judge on the first issue must be reversed.

The second issue has not been decided; and what has taken place regarding it appears to be this, that the learned Judge intimated so strongly his opinion that the case must be decided for the defendant on the other issue that his counsel refrained from offering evidence upon it. There was nothing in the conduct of the learned counsel in the matter to bind him to the case as it now stands; and the suit must be remanded to be tried on the second issue in one of the Division Courts. It will be open for both parties to produce evidence. As the case will come again before this court after the issue has been decided, we shall reserve the question of the costs of this appeal.

WESTROPP, J., concurred.

Decree reversed and suit remanded.

Attorney for appellant: *C. Tyabji.*

Attorneys for respondent: *Dallas, Lynch, & Langdale.*