

which it is usually understood, namely, the bundle of facts which have to be proved in order to entitle the plaintiff to relief. In that sense the word "subject-matter" was understood by the Madras High Court in *Achuta Menon v. Achutan Nayar*⁽¹⁾, and by the Calcutta High Court in *Kamini Kant Roy v. Ram Nath Chuckerbutty*⁽²⁾, in cases arising under section 373 of the Code of 1882.

In the first suit between the present parties there was no cause of action because notice had not been given. In the present suit there is a cause of action because notice has been given. Therefore, the causes of action are not the same. We, therefore, affirm the order and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

BIRDICHAND JIVRAJ (1ST DEFENDANT), APPELLANT v. THE STANDARD BANK, LIMITED (PLAINTIFFS), RESPONDENTS.

Company—Pledge of shares in a Company—Shares transferred to the name of the pledgee in the register of the Company—Shares not fully paid up—Compulsory liquidation of the Company—Payment of calls as contributory by pledgee of shares—Pledgee not entitled to recover calls paid on the footing of an indemnity—Pledgee paying calls not a trustee for the pledgor—Contract—Agent and Principal.

From March to October 1913, the plaintiff Bank advanced to B, the agent of the undisclosed principal defendant No. 1, various sums aggregating Rs. 1,74,200 on the security of 3,605 shares of the Indian Specie Bank, B undertaking to maintain a margin of Rs. 15 per share. The shares deposited

¹ O. C. J. Appeal No. 24 of 1916.

⁽¹⁾ (1897) 21 Mad. 35.

⁽²⁾ (1893) 21 Cal. 265.

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by B were transferred to the plaintiff Bank's name on the share register of the Indian Specie Bank, and the dividends when received by the plaintiff Bank were credited to the loan account of B. In September 1913, the Indian Specie Bank shares began to fall. On 7th October 1913, B provided further securities as margin which realised about Rs. 20,000, but thereafter failed to provide any further margin and eventually 181 shares were sold by the plaintiff Bank of which 161 had been transferred to the purchaser's name before December 1913, when a winding-up order was made for the compulsory liquidation of the Indian Specie Bank. In the liquidation the plaintiff Bank had been placed on the A list of contributories for 3,444 shares and on the B list for 161 shares for the shares deposited by B. On the 20th February 1914 B was adjudicated insolvent. Subsequently in pursuance of the call made by the Official Liquidator of the Indian Specie Bank, the plaintiff Bank paid Rs. 50 per share in respect of 3,444 shares standing in its name. The plaintiffs sued to recover from the 1st defendant (1) Rs. 1,57,665-13-7, and interest thereon in respect of the advances made by them, (2) Rs. 1,72,200 being the amount of calls paid by them as contributories, and interest thereon and (3) an indemnity for any claim which might be made against them in respect of 161 shares. The Official Assignee as the assignee of the estate and effects of B was made a formal party, being defendant No. 2. The trial Court decreed the entire claim of the plaintiffs.

Held on appeal,

(1) That the plaintiffs' claim must be limited to a decree for the sums advanced by them, interest and costs.

(2) That the plaintiffs were not entitled to be indemnified for the amount of calls paid or to be paid by them as contributories inasmuch as the forced payment of calls by them as the registered holder of the shares upon a compulsory liquidation could not be regarded as an expenditure for the preservation of the security, nor were the plaintiffs as mortgagees the trustees for the mortgagor at the time of paying such calls.

Phene v. Gillan⁽¹⁾, referred to.

CONTRACT.

On the 10th March 1913, the Standard Bank, Limited, the plaintiffs, advanced to one Bansidhar Manjulal, the defendant No. 2, a sum of Rs. 1,25,000 on a demand promissory note carrying interest at 7 per cent. per annum. As security for

⁽¹⁾ (1845) 5 Hare.1 at p. 10.

the said amount the defendant No. 2 deposited with the plaintiffs 2,500 certificates of shares in the Indian Specie Bank, Limited, and had the same transferred in the register of the said Bank to the name of the plaintiffs.

On the 9th April 1913, the plaintiffs advanced to the said defendant a further sum of Rs. 45,000 on a demand promissory note carrying interest at $7\frac{1}{2}$ per cent. per annum, the loan being secured by the deposit of additional 1,000 shares of the Indian Specie Bank transferred to the name of the plaintiff.

The sums provided by the two preceding loans being fully utilised, Bansidhar arranged with the plaintiffs to be allowed an overdraft of Rs. 4,200 on his current account on the security of 105 more shares of the Indian Specie Bank transferred to the plaintiffs' name as before.

It was agreed that the margin money of Rs. 15 per share was to be maintained by the borrower on all shares transferred to the Bank's name.

The plaintiffs collected the dividends on the shares deposited with them and applied them in reduction of the interest on loans.

On 3rd October 1913, the plaintiffs called upon Bansidhar to pay margin money of Rs. 30,000 as the shares of the Specie Bank had fallen in value.

Bansidhar thereupon gave to the plaintiffs two hundis for Rs. 20,000, on which the plaintiffs realised Rs. 19,975 for which they gave credit to Bansidhar.

On the 20th October 1913, the plaintiffs again called on Bansidhar to pay further margin money of Rs. 24,500. Bansidhar expressed his inability to make such payment; he however promised to deposit further shares but did not do so.

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On the 25th October 1913 when the shares were further falling the plaintiffs again called on Bansidhar to pay margin money at the rate of Rs. 10 per share. Bansidhar not replying to this demand the plaintiffs sold 181 shares and applied the sale-proceeds in reduction of the amounts due to them. Of the shares sold 161 had been transferred to the purchaser's name in the register of the Indian Specie Bank.

About the beginning of December 1913, the Indian Specie Bank was ordered to be wound up compulsorily.

On the 11th December 1913 the plaintiffs filed a suit being suit No. 1166 of 1913 against Bansidhar in which a consent decree was obtained ordering the defendant Bansidhar to pay to the plaintiffs the sum of Rs. 1,57,165-0-10 with interest and costs. The decree further provided as follows: "And this Court doth with like consent declare that the defendant is bound to indemnify the plaintiffs against all calls made on the three thousand six hundred and five shares of the Indian Specie Bank hypothecated as security by the defendant with the plaintiffs as mentioned in the plaint herein and this Court with the like consent doth further order that the defendant do pay to the plaintiffs such amount for calls on the aforesaid shares as the plaintiff Bank may be held liable to pay to the Official Liquidator of the Indian Specie Bank."

Bansidhar was adjudicated insolvent on the 20th February 1914. After the said adjudication the plaintiffs discovered that in taking the loans and over-draft Bansidhar was really acting as the agent of Birdichand Jivraj, the 1st defendant, and that the shares deposited with the plaintiff were the shares of the 1st defendant and the *hundi* given to the plaintiffs was the 1st defendant's *hundi*.

On the 2nd December 1914 the plaintiffs filed the present suit against Birdichand (defendant No. 1) and Official Assignee and assignee of the estate and effects of Bansidhar (defendant No. 2), praying *inter alia*, that the 1st defendant may be ordered to pay to the plaintiffs the sum of Rs. 1,57,665-13-7 with further interest on the principal sum remaining unpaid at 7½ per cent. per annum till payment, that the 1st defendant may be ordered to pay to the plaintiffs the costs of suit No. 1166 of 1913 and that the 1st defendant may be ordered to indemnify the plaintiffs against the liability incurred by the plaintiffs as contributories in respect of the said shares, the 1st defendant depositing such security against the said liability as the Court might deem fit. The plaintiffs did not ask any relief against the defendant No. 2. The 1st defendant submitted that Bansidhar had no authority or right to borrow the loans from the plaintiffs on his behalf or to pledge any of his shares with the plaintiffs, that Bansidhar was his *pacca adatiya* and not an agent for him, that Bansidhar as such *pacca adatiya* was himself liable to procure money for doing business for his constituent if the constituent did not supply him with sufficient funds and that even if Bansidhar borrowed money for doing any business on behalf of the 1st defendant he must be deemed to have acted on his own account. The 1st defendant further submitted that the plaintiffs having sued and elected to sue Bansidhar and obtained a decree against him in suit No. 1166 of 1913 in respect of the identical cause of action, the plaintiffs could not maintain the present suit. Lastly the 1st defendant submitted that in any event no cause of action was disclosed against him there being no privity between him and the plaintiffs.

The suit was tried by his Lordship Macleod J. decreeing the plaintiffs' claim "against the 1st defendant

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for Rs. 1,57,665-13-7 with interest at seven per cent. from the respective dates of the advances of the three sums from 24th September 1914 till judgment, and for Rs. 1,72,000 with interest at 6 per cent. from the 15th September 1915 and costs of the suit and for an indemnity against the liability which may have to be satisfied by the plaintiffs in respect of 161 shares of the Indian Specie Bank, Limited."

The defendant No. 1 appealed.

The appeal was heard by Scott C. J. and Heaton J., on the 20th July 1916 when the case was remanded to the lower Court for the determination of two issues.

The following judgment was delivered by the appeal Court:—

SCOTT, C. J.:—The question in this appeal is as to the liability of the defendant in respect of certain loans granted by the respondents on a security of shares of the Indian Specie Bank which were not fully paid and upon which on liquidation of that Bank a large liability in respect of the calls has resulted. It is conceded on behalf of the appellant that no question was raised in the lower Court either in the issues or the argument disputing the liability of the first defendant to indemnify the plaintiffs against the liability incurred by them as contributories in respect of the said shares in the winding up. And it is stated that it was not realized in the lower Court that the liability of the first defendant can be successfully disputed upon legal grounds.

The question is one of great importance as may be seen from the decree which provides for a sum aggregating Rs. 1,72,200 in respect of calls already paid in the liquidation and there is a further decree against the first defendant to indemnify the plaintiff Bank against further calls.

The plaintiffs allege that the question is not merely one of law but will turn largely on the question of fact, because they say that there was or were a conversation or conversations in which the first defendant or his agent undertook to indemnify the plaintiff Bank in respect of any calls which might be made upon the shares.

We think that if the legal issue is allowed to be tried, the issue of fact must also be tried, and having regard to the importance of the case, we do not think that we can rightly dispose of the suit without a decision on the issues. Therefore under Order XLI, Rule 25, we frame the following issues :—

(1) Whether the first defendant by his agent did not agree to indemnify the plaintiff Bank with regard to any unpaid calls on these shares ?

(2) Whether in any event the first defendant is not liable to indemnify the Bank with regard to such calls ?

We refer these issues for trial to the lower Court and direct it to take such additional evidence as may be required and return the evidence and the findings and the reasons therefor, in due course to this appeal Court.

With regard to the first question argued as to the election of the plaintiffs, we are of opinion that there can be no election in a case where the principal who is now the first defendant has deceived the plaintiffs.

Costs costs in the appeal.

THE issues sent down were tried by Macleod J. His Lordship heard further evidence and found both issues in the negative. The reasons recorded for finding on the second issue were as follows :—

The only direct authority which has been cited on this question is *Phene v. Gillan*⁽¹⁾. The defendant had borrowed money on shares in a banking company which had been transferred to the plaintiff as security for the loan. The loan was repaid but before the re-transfer of the shares could be

⁽¹⁾ (1845) 5 Hare 1.

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effected a creditor recovered judgment against the public officer of the company and threatened execution against the mortgagee as one of the shareholders. It was held that the defendant was bound to indemnify the plaintiff on the ground that he having elected to exercise his right to redeem he became the owner and the mortgagee became trustee of the shares for the mortgagor in equity. The original transfer of the shares as security for the loan gave no right to an indemnity. This should be sufficient to decide the point, but it was contended that a mortgagee was in the same position as a trustee, but I do not think this is so. A mortgagee is entitled to add to the principal debt moneys spent in protecting the security and if the Bank had made the call, the plaintiffs if they had paid it to prevent a forfeiture of the shares would be entitled to a charge on the shares for the amount paid but it can scarcely be said that payment of a call by the Liquidator would be made to protect the security.

In my opinion the second issue should be answered in the negative.

Whether the Bank having paid the call can add it to the mortgage debt in their accounts and after deducting the value of the security can sue the defendants for the balance as a personal debt is a question which does not appear to arise in the present suit.

The appeal was finally heard by Scott C. J. and Heaton J.

Kanga with Jardine, for the appellant.

Strangman with Setalvad and Desai, for the respondent.

Reference was made to the following during argument: *Ex parte Fewings, In Re Sneyd*⁽¹⁾; *Phene v. Gillan*⁽²⁾; *Hobbs v. Wadet*⁽³⁾; *Lacey v. Hill*⁽⁴⁾; *Hardoon v. Belilios*⁽⁵⁾, Davidson's Conveyancing, Vol. II, Pt. II, p. 1203; Fisher on Mortgage, 6th Edn. p. 894; Halsbury's Laws of England, Vol. XXI, p. 169; Coote on Mortgage, Edn. 7, Vol. I, p. 291.

SCOTT, C. J. :—The plaintiffs are the Standard Bank.

In February 1913, a broker named Hemchand asked the Managing Director of the Bank to advance money

⁽¹⁾ (1883) 25 Ch. D. 338 at p. 352. ⁽³⁾ (1887) 36 Ch. D. 553.

⁽²⁾ (1845) 5 Hare 1.

⁽⁴⁾ (1874) L. R., 18 Eq., 182 at p. 191.

⁽⁵⁾ [1901] A. C., 118.

on the security of shares in the Indian Specie Bank with the result that a transaction was recorded by him in the following terms:—

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"Bombay, 26th February 1913.

I HAVE arranged by your order and on your account a loan for twelve months on 2,000 to 2,500 shares of the Indian Specie Bank, Limited, at Rs. 50 per share; the loan to be given to Bansidhar Mangtulal at 7 per cent. and a margin of Rs. 15 per share to be maintained by the borrower; the shares to be transferred to the Bank's name. Money payable on or before the 10th March 1913."

On the 10th March 1913, Bansidhar Mangtulal acting on behalf of an undisclosed principal, the first defendant Birdichand Jivraj, executed a demand promissory note in favour of the Bank for Rs. 1,25,000 and that sum was carried to a suspense account to be at the disposal of Bansidhar. Shares aggregating 2,500 were afterwards brought to the Bank with blank transfers.

On the 4th of April 1913, it was arranged through the same broker that the plaintiff Bank should advance a further sum of Rs. 45,000 on 1,000 shares of the Indian Specie Bank.

The note of the transaction was as follows:—

"Bombay, 4th April 1913.

I HAVE this day arranged by your order and on your account a loan for Rs. 45,000 fixed for 12 months on 1,000 Indian Specie Bank, Limited, shares.

A margin of Rs. 15 to be maintained at 7½ per cent. Payable on or about 9th April 1913."

On the 9th April, a demand promissory note for Rs. 45,000 was passed to the plaintiff Bank by Bansidhar and the amount was carried partly to suspense account and partly to Bansidhar's account.

The amount provided by these loans having been fully utilized Bansidhar wanted in October 1913 to overdraw his current account. This was allowed to

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the extent of Rs. 4,200 on a deposit of 105 more shares in terms of a formal printed overdraft agreement, of which paras. 4 and 5 were as follows :—

“ 4. I agree and undertake that the value of the shares deposited with you as security as aforesaid shall at all times exceed in value at the market price of the day the amount due by me to you so that the security may at the value aforesaid exceed the amount of my indebtedness to you by a margin of rupees 15 per share and in the event of the said shares at any time becoming of less value at the market price of the day so as not to provide the margin agreed on as aforesaid I agree and undertake to forthwith make up such deficiency on demand by you either by depositing further security approved of by you sufficient to make up the security to the agreed amount or by making part payment of the moneys due by me so that my indebtedness may be reduced to an amount for which the security so deposited amounts to Rs. 15 per share in excess of the amount due by me. So that you may always be secured by shares or other security approved by you which at the market value thereof of the day shall at least exceed in value by Rs. 15 per share the amount of my indebtedness from time to time to you.

5. That you or your Managing Director shall be at liberty in default of my paying the moneys for the time being due to you by me on demand or in default of my keeping up the full margin of security of the value as aforesaid and without any consent or concurrence on my part to sell the said shares or other security deposited from time to time by me or any of them by public auction or private contract and in such manner in all respects as you may think fit and out of the proceeds thereof to pay—

(a) All expenses of and incidental to such sale and also all costs and expenses which may have been incurred by you in consequence of such default in payment of the said loan or in maintaining the full margin of value of the said shares as aforesaid.

(b) The debt then due to you with interest. You shall be at liberty in the event of any default on my part in payment of such moneys on demand or in maintaining the full margin of value, to purchase yourselves the said shares or any of them at the market price of the day on which such default shall have been made.”

All the shares deposited by Bansidhar were transferred to the plaintiff Bank's name on the share register of the Specie Bank. Dividends when received were credited to the loan account.

In September 1913, the Indian Specie Bank shares began to fall and, on the 7th October, Bansidhar provided further securities as margin which realised about Rs. 20,000 but thereafter he failed to provide any further margin and eventually 181 shares were sold by the plaintiff Bank of which 161 had been transferred before a winding-up was made for the compulsory liquidation of the Specie Bank. In the liquidation the plaintiff Bank has been placed on the A list of contributories for 3,444 shares and on the B list for 161 of the shares deposited by Bansidhar. A call of Rs. 50 per share has been paid by the plaintiff Bank in respect of the 3,444 shares.

Decrees have been passed at the suit of the plaintiff Bank against both Bansidhar, the ostensible borrower, and Birdichand his undisclosed principal for debt and interest aggregating Rs. 3,50,500 which includes both the amount due for advances and interest and the amount paid by the plaintiff Bank on the call made on the Specie Bank shares. The decree also declares that the plaintiff Bank are entitled to be indemnified for any claim which may be made against them in respect of the 161 shares for which the plaintiffs are entered as contributories on the B list in the liquidation proceedings of the Specie Bank.

The only question now in dispute in this appeal is whether the plaintiffs can recover from the defendants as a debt the amount paid in respect of the call and whether they are entitled to an indemnity in respect of the 161 shares as declared by the decree.

It is not now contended that there was any special agreement to indemnify the plaintiffs in respect of the uncalled liability on the Specie Bank shares at the time of the deposit. It has been held by the lower Court that the evidence adduced fails to establish any such

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agreement and no exception is now taken to that finding.

Substantially the argument for the plaintiffs was confined to the suggestion of an implied agreement by the borrower to indemnify the lender in respect of a security which might be onerous. It was said this must have been the business understanding between the parties and that no lender would lend except upon such an agreement to indemnify.

It is pretty certain, however, that the possibility of the Indian Specie Bank going into compulsory liquidation during the continuance of the loan transaction never entered into the contemplation of the parties and even in October 1913 after the shares had begun to fall in value the plaintiffs were still willing to allow an overdraft on a deposit of some of the same shares carrying the same uncalled liability.

Had the possibility of calls on the shares been considered the plaintiffs would either have left them in the name of the then registered owner, or if they wished to take a transfer, would have refrained from doing so except upon an express indemnity. It is not unreasonable to suppose having regard to the magnitude of the transactions that the plaintiffs, had they realised the risk attaching to such shares, would have taken the ordinary precautions suggested by business experience: see Davidson's Conveyancing, Vol. II, Part II, p. 1203. So much for the suggested implication of fact.

Nor can it be successfully contended that as a matter of law it is part of the contract that the mortgagor should indemnify the mortgagees against the consequences of holding property which they held for their own security and not for the benefit of the mortgagor. The mortgagees received the dividends on the shares in excess of the interest on the loan, and credited such

excess in reduction of their debt and they must be supposed to have contemplated all the liabilities to which the holding of such shares might subject them. It was held in *Phene v. Gillan*⁽¹⁾ that there is not at law any such implied contract of indemnity. It is impossible to contemplate the mortgagors in such a case as the present attempting to redeem the Specie Bank shares and I doubt if a forced payment of a call by the registered holder of shares upon a compulsory liquidation could be regarded as an expenditure for the preservation of the security or expenditure contemplated in clause 5 of the overdraft agreement. The mortgagees in the present case did not, in my opinion, occupy the position of trustees for the mortgagors at the time of paying the calls and cannot therefore be entitled to an indemnity as trustees.

The decree of the lower Court must, therefore, be varied by limiting the sum decreed to the amount of the advances, interest and costs and by deleting the declaration as to indemnity.

Defendants must pay the costs of the appeal up to and including the 20th of July. The plaintiffs must pay the subsequent costs of the appeal but the parties must bear their own costs of the remand and findings thereon since they were rendered necessary by the defendant's oversight at the original hearing. The order as to costs in the original Court will stand.

Decree varied

Solicitors for appellants : Messrs. *Matubhai, Jamietram* and *Madan*.

Solicitors for respondents : Messrs. *Payne & Co.*

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⁽¹⁾ (1845) 5 Hare 1 at p. 10.

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