APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and Mr. Justice Madhavan Nair.

1937, September 28.

G. TIRUVENGADACHARIAR, OFFICIAL LIQUIDATOR OF THE NATIONAL LIVE STOCK REGISTRATION BANK, LIMITED (IN LIQUIDATION) (APPLICANT), APPELLANT,

v.

A. T. VELU MUDALIAR AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Indian Companies Act (VII of 1913), sec. 235—Share broker of a company—If an officer—Promoter of a company—Who is—Misfeasance summons against share broker under sec. 235—Incompetency of.

A person appointed as a share broker of a limited liability company, without more, is not an "officer" within the meaning of section 235 of the Indian Companies Act.

A.T.V. and P.M. were partners in a firm. They were appointed share brokers of a limited liability company. Article 9 of the articles of association which came into force at a later date stated that their firm should be the sole selling brokers of the company and under it they were to receive a commission of five per cent on the amount subscribed. After the formation of the company the matter was discussed by the directors and they passed a resolution agreeing to ratify the arrangement subject to an immaterial alteration. The brokers accepted the modification and they were paid Rs. 8,865–11–3 on the basis of the modified agreement, notwithstanding that the directors had exceeded their powers in ratifying it. The company went into liquidation and the Official Liquidator took out a misfeasance summons under section 235 of the Indian Companies Act, 1913, for the recovery of the Rs. 8,865–11–3 on the ground that the agreement in pursuance of which they were paid that sum was *ultra vires*. Both the persons were sought to be made liable as "officers" of the company and A.T.V. on the further ground that he was also a "promoter" of the company. A.T.V.'s

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* Original Side Appeal No. 47 of 1937.

signature appeared at the foot of the memorandum of association and he took 100 shares out of 1,200 shares initially subscribed and the money paid by him for those shares was utilised in paying the expenses of formation of the company. Apart from this there was no evidence showing that A.T.V. took any steps in discussing the formation of the company or in bringing the company into being. He had nothing to do with the selection of the directors or the settlement of any contract except the contract under which his firm was to act as share brokers.

Held that neither of them was an "officer" of the company, that A.T.V. was not a "promoter" of the company, and that proceedings under section 235 of the Indian Companies Act against them were incompetent.

Twycross v. *Grant*(1) followed.

Re The Liberator Permanent Benefit Building Society(2) referred to.

APPEAL from the judgment and order of GENTLE J., dated 28th April 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 845 of 1933 in Original Petition No. 206 of 1932.

C. Narasimhachari for appellant.—The respondents were share brokers of the company. They were paid Rs. 8,865-11-3 by the directors as commission and they received the same with the knowledge that the agreement under which the payment was made was beyond the powers of the directors inasmuch as the articles of association permitted them only to pay a much smaller rate of commission. Really it amounts to an overpayment under an *ultra vires* agreement.

[CHIEF JUSTICE.—The agreement was *intra vires* of the company but was *ultra vires* of the directors.]

Rustomji in his book on Company Law at page 46 defines the scope of an *ultra vires* act as distinguished from an illegal act; vide *Turner* v. *The Bank of Bombay*(3), *Ashbury Railway Carriage and Iron Co.* v. *Riche*(4) and *In re Coltman. Coltman* v. *Coltman*(5). There is no doubt that the amount could be

(1) (1877) 2 C.P.D. 469.
(2) (1894) 71 L.T. 406.
(3) (1900) I.L.R. 25 Bom. 52, 60.
(4) (1875) 7 H.L. 653, 668, 672.
(5) (1881) 19 Ch. D. 64, 69, 72.

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recovered by a suit. The Official Liquidator took out a misfeasance summons under section 235. The trial Judge, GENTLE J., held that the claim was barred.

[CHIEF JUSTICE.—Before coming to the question of limitation you must satisfy us that the respondents are persons contemplated by section 235 as persons against whom a misfeasance summons could be taken.]

Both the respondents come under the definition of "officer" of the company and the first respondent comes under the definition of a "promoter" also. Section 2 (11) of the Indian Companies Act defines an "officer" of the company.

[CHIEF JUSTICE.—Can you call a share broker an "officer" of the company?]

For the purposes of section 235 an auditor has been held to be as an "officer" of the company, though for the purposes of some other sections he is not.

[CHIEF JUSTICE.—You cannot call a share broker a servant of a company. He does not carry out the directions of the directors.]

The articles, by providing for commission to share brokers, have made them "officers" of the company. The company in its constitution recognized the necessity of having share brokers; vide *In re London and General Bank*(1). See also *Re The Liberator Permanent Benefit Building Society*(2).

[CHIEF JUSTICE.—In *Re The Liberator Permanent Benefit Building Society*(2) the solicitor by taking a fixed salary and undertaking to refuse other work had lost his independent character. KAY L.J. says that a broker, as such, is not an officer.]

Section 235 of the Indian Companies Act, 1913, corresponds to section 275 of the English Act of 1929 and section 162 of the earlier English Act of 1862. A "promoter" is a person who brings a company into existence and takes an active part in connection with the same. In *Twycross* v. *Grant*(3) COCKBURN C.J. defines the word "promoter". The first respondent brought the company into existence by signing the memorandum of association and also the articles of association.

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(1) [1895] 2 Ch. 166. (2) (1894) 71 L.T. 406.
(3) (1877) 2 C.P.D. 469

He also subscribed for 100 shares and paid the first call which was utilised for the expenses of the company. In Volume I of Palmer's Company Precedents at pages 103 to 109 a detailed discussion is to be found as to who is a "promoter". A broker was held to be a promoter under the circumstances of *Emma Silver Mining Co.* v. *Lewis*(1).

T. D. Srinivasachari for respondents.—None of the circumstances mentioned in *Lydney and Wigpool Iron Ore Company* v. *Bird*(2), is to be found in the present case. For the definition of a promoter see also *In re Olympia, Limited*(3).

[CHIEF JUSTICE.—We do not want to hear you further.]

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal arises out of a misfeasance summons taken out by the Official Liquidator of the National Live Stock Registration Bank Limited against the respondents, who were the brokers of the company. The company was registered on 2nd July 1927 with a nominal capital of Rs. 5,00,000, divided into 50,000 shares of Rs. 10 each, of which 40,500 were preferred and 9,500 ordinary shares. The certificate permitting the company to carry on the business was issued by the Registrar of Joint Stock Companies on 1st August 1927. The company was unsuccessful in its operations and went into voluntary liquidation on 11th December 1930. The voluntary liquidation was turned into a compulsory liquidation by an order of this Court dated 13th October 1932. The Official Liquidator sought to make the respondents liable to repay a sum of Rs. 8,865-11-3, which they had received as share brokers of the company. The respondents are partners of a firm of provision dealers carrying on business

(1) (1879) 4 C.P.D. 396, 407. (2) (1886) 33 Ch. D. 85, 92.
(3) [1898] 2 Ch. 153, 181.

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under the name of A. T. Velu Mudaliar & Co. They had no previous experience as share brokers and it is obvious that they owed their appointment to their relationship to V.K. Lakshmana Mudaliar, one of the promoters of the company, who is the son of the second respondent and the brother-in-law of the first respondent. A draft of the agreement under which the respondents were to act as brokers of the company was drawn up in the month of May 1927, and, although the company had not then been registered, it was signed on 31st May 1927. Under it the respondents were to receive a very high commission, Rs. 1–8–0, for every share of the company sold through them, and eight annas in respect of every share sold through other agencies. Article 9 of the articles of association which came into force at a later date stated that the respondents' firm should be the sole selling brokers of the company and under it they were to receive a commission of five per cent on the amount subscribed, but the document of 31st May 1927 purported to fix the commission at fifteen per cent. After the formation of the company the matter was discussed by the directors and on 22nd October 1927 they passed a resolution agreeing to ratify the arrangement, subject to an alteration which amounted to very little. The respondents accepted the modification and were paid on the basis of the modified agreement, notwithstanding that the directors had exceeded their powers in ratifying it. The appeal is not, however, concerned with the liability of the directors in this respect.

The amount paid to the respondents was, as I have already indicated, the sum of Rs. 8,865–11–3

which the Official Liquidator desired to recover from them on the ground that the agreement was *ultra vires*. Accordingly he took out a summons under section 235 of the Indian Companies Act, 1913, and the matter in due course came before STONE J., who referred the question of what was due under the agreement to the Official Referee. After holding an inquiry the Official Referee reported that the respondents were not entitled to retain the Rs. 8,865-11-3. The Official Referee's report came before GENTLE J., when it was contended on behalf of the respondents that all remedy against the respondents had become time-barred. It was said that the article which applied to the case was article 36 of the Indian Limitation Act, which allows only a period of two years. The Official Liquidator urged that the article which applied was article 120, which allows a period of six years. The learned Judge found that article 36 applied and this appeal has been filed to challenge the finding.

The Court is however not called upon to decide the question, as it is manifest that, for other reasons, the Official Liquidator is not entitled to ask for an order against the respondents under section 235 of the Indian Companies Act, 1913. That section only applies to a person who has taken part in the formation or promotion of the company, to a past or present director, manager or liquidator or to an officer of the company. Neither respondent was ever a director, manager or liquidator of the company, and, for reasons which I shall indicate, I do not think that either can be deemed to be a promoter or officer. As a matter of fact so far as the second respondent is

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concerned, the Court is not asked to hold that he was a promoter.

I will first discuss the question whether the first respondent can be deemed to be a promoter. In *Twycross* v. *Grant*(1) COCKBURN C.J. defined the word " promoter " as being one who undertakes to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose. Other definitions have been given by learned Judges from time to time, but it is impossible to define accurately what is meant by the word "promoter". The difficulty is discussed at length by the learned author of Palmer's Company Precedents at pages 103 to 109. After referring to a number of the more prominent cases, the learned author observes at page 106 :

> " It is obvious, therefore, that a person who originates the scheme for the formation of the company, has the memorandum and articles prepared, executed and registered, and finds the first directors, settles the terms . . . (if any), and makes arrangements for advertising and circulating the prospectus and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this *control* which lies at the root of the fiduciary relation of the promoter to the company. Nor is he the less a promoter if all or most of these activities are performed nominally by a company which he controls.
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> But a person who has done much less than this—takes a much less prominent part—may bring himself within the meaning of the term and may be held liable as a promoter."

Each case must be decided according to the evidence. If it is clear that the persons charged were merely servants or agents of the promoters or servants or agents of the company, they cannot be classified as promoters, and in this connection

(1) (1877) 2 C.P.D. 469.

the learned author makes mention of brokers, bankers, and solicitors. Of course, brokers, bankers, and solicitors could put themselves in the position of being promoters, but in order to do so they would have to travel outside their ordinary spheres.

Now, what are the facts here? As I have indicated, the question of promotion only applies to the first respondent. It is said that he must be deemed to have taken part in the formation of the company and to be a promoter because he signed the memorandum and articles of association and subscribed for 100 shares. There is no evidence showing that he took any part in discussing the formation of the company or in taking any steps to bring the company into being, apart from the fact that he signed the memorandum of association and paid for 100 shares. It is not even suggested that he had anything to do with the drawing up of the memorandum and articles of association. There is no suggestion that the first respondent had anything to do with the selection of the directors or the settlement of any contract, except the contract under which his firm was to act as brokers. After the company had been formed and had started business the first respondent's firm induced certain people to subscribe for shares, but it is not alleged that they did anything before the company was launched. The minimum subscription was fixed at 500 shares and the signatories to the memorandum of association themselves subscribed for 1,200 shares. In the memorandum of association the only persons referred to as promoters are V. K. Lakshmana Mudaliar and J. W. Samuel.

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It comes to this. The Court is asked to hold the first respondent to be a promoter because his signature appears at the foot of the memorandum and he took 100 shares of the 1,200 initially subscribed. This is a contention which I am unable to accept. The law requires that there shall be seven signatories to the memorandum of association of a public company. A person who has taken no part in the formation or promotion of the company may be asked to sign the memorandum as a subscriber for one or more shares, and this usually happens. It was mentioned in the course of the argument that the money subscribed by the first respondent for his 100 shares was utilised in defraying part of the expenses of forming the company. That may be, but it was a matter which concerned the directors. The application of the money which the first respondent paid for his shares was a matter over which he had no control, and the fact that the money was utilised in paying the expenses of formation cannot make him a "promoter". The agreement with the respondents was an agreement which conscientious directors ought never to have entered into and in doing so the directors deliberately exceeded their powers. But this, of course, has nothing to do with the question whether the first respondent is to be deemed to be a person who took part in the formation and promotion of the company. For the reasons indicated it must be held that the Official Liquidator was not entitled to take out the summons against the first respondent on the ground that he was a promoter.

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Can the respondents be deemed to be officers of the company? Section 2 of the Act defines the word "officer" as including

"any director, manager or secretary but, save in sections 235, 236 and 237, does not include an auditor".

The definition is therefore not exhaustive. The inclusion of the auditor for the purposes of sections 235, 236 and 237 follows the course adopted in England and avoids the discussion which had taken place in the Courts there with regard to the position of an auditor. But it does not follow because an auditor is an "officer" for the purposes of section 235, the company's share broker is in the same position. In *Re The Liberator Permanent Benefit Building Society*(1), where the question was whether a person who was appointed to act as solicitor to the society was an "officer" of the society, CAVE J. observed:

"It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society. All these persons render services to the society but they cannot be said to be in the employment of the society so as to make them officials."

I can see no difference between the position of a broker to a company whose duties are confined to dealing with the shares of the company and the position of the banker who has to deal with the moneys of the company. A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office. Therefore,

(1) (1894) 71 L.T. 406.

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to classify him as an officer of the company within the meaning of section 235 of the Act would, in my opinion, be putting too great a strain on the wording of the section. If moneys had been wrongly paid to the brokers, the Official Liquidator had, subject to the law of limitation, other means of recovering them, but he is not entitled to use section 235 for the purpose.

For these reasons the appeal fails and must be dismissed with costs, which will be paid out of the assets of the company. The Official Liquidator will be allowed his costs out of the assets.

MADHAVAN NAIR J.—I entirely agree and have nothing to add.

G.R.