APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

A. W. DOMINGO (PLAINTIFF) *v.* L. C. DESOUZA (DEFENDANT).* 1928 *February*, 14.

Act No. IX of 1872 (*Indian Contract Act*), *section* 78—*Shares—Agreement to sell so many shares in a particular company—"Unascertained goods"—Act No. VII of* 1913 (*Indian Companies Act*), *sections* 18 *and* 28—*Breach of agreement to transfer shares—Measure of damages.*

"Goods" as defined in the Indian Contract Act, 1872, comprise every kind of movable property, including shares in a company. Where, therefore, a person agrees to sell so many shares in a company without specifying the numbers of the share certificates, the agreement is merely an agreement to sell unascertained goods and passes no interest in any shares owned by the vendor until such shares are definitely ascertained.

An agreement for the sale of shares does not imply a further agreement to have the transferee's name registered as the holder.

In the event of the proposed transferee refusing to complete such an agreement by the purchase of the stipulated number of shares, the measure of damages would be the difference between the contract price and the market price at the time when the breach took place; but it would be the duty of the transferor to mitigate the loss consequent upon the breach. *Jamil* v. *Moolla Dawood Sons and Co.* (1), *Maneckji Pestonji Bharucha* v. *Wadilal Sarabhai and Co.* (2), *London Founders Association* v. *Clarke* (3), *Muir Mills Co. Ltd., of Cawnpore* v. *T. H. Condon* (4), *Bahadur Singh* v. *Shiam Sundar Tug* (5), and *Nanney* v. *Morgan* (6), referred to.

*First Appeal No. 327 of 1925, from a decree of Kashi Prasad, Second Additional Subordinate Judge of Cawnpore, dated the 20th of April, 1925.

(1) (1915) I.L.R., 43 Calc., 493. (2) (1926) I.L.R., 50 Bom., 360.
(3) (1888) L.R., 20 Q.B.D., 576. (4) (1900) I.L.R., 22 All., 410.
(5) (1914) I.L.R., 36 All., 365. (6) (1887) 37 Ch. Div., 346.

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THE facts of this case are fully stated in the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

SULAIMAN and KENDALL, JJ. :—This is a plaintiff's appeal arising out of a suit for rendition of accounts brought against the defendant. The plaintiff's case was that on the 16th of February, 1920, the parties entered into a definite contract under which it was agreed that the defendant was to advance to the plaintiff money necessary for the purchase of 100,000 French francs, the amount being provisionally estimated to be Rs. 60,000, at 9 per cent. per mensem interest, payable in two years; it was agreed that these francs would be kept in fixed deposit in some French Bank, and on the expiry of the period of deposit would be converted into pounds sterling and remitted to India, and that the defendant, after deducting the amount of his principal and interest, was to pay to the plaintiff the balance of the profit, if any, and if there was loss the plaintiff would be liable for it. The defendant did not deny the completion of the contract for the purchase of the French francs. But his main pleas were that subsequently, in June, 1920, the plaintiff entered into another contract with the defendant for the purchase of 500 ordinary and 500 preference shares of the Premier Oil Mills, which were to be taken over by the plaintiff in the month of December following, and in case the plaintiff failed to take them over, the defendant would be at liberty to set off and adjust the accounts for profit and loss, as the case might be, on the two transactions. There was no express mention in the written statement that the plaintiff was to pay up the amount borrowed by him within any fixed time, or that he had broken the contract by not paying the amount within that time. It was, however, pleaded that the plaintiff failed to perform his part of the contract and

the defendant was therefore justified in "putting an end to the whole affair" on the 16th April, 1922. There was also a plea that the plaintiff accepted the position as communicated to him by the letter bearing the date mentioned, and after a lapse of two years was estopped from recovering anything.

The main questions of fact which were in dispute were (1) whether the plaintiff had agreed to make monthly payments by way of instalments of the amount which had been advanced to him by the defendant on the promissory notes; (2) whether there was a complete contract for the purchase of 500 ordinary and 500 preference shares of the Premier Oil Mills Company in June, 1920, to be delivered in December following; (3) whether it was a part of the contract in June that the two accounts, namely, the purchase of francs and the purchase of Premier Oil Mills shares, should be adjusted together and the profits on one set off against the loss on the other; and (4) whether the defendant sent any letter on the 16th of April, 1922, intimating that he would put an end to the "whole affair" after a fortnight if no reply was received thereto. The questions of law which would arise would be (*a*) whether there was only a contract for the purchase of the Premier Oil Mills shares or whether there was a complete sale, and (*b*) whether there was any breach committed by either party and (*c*) the legal consequences that would follow.

[Their Lordships then considered the evidence relating to the various questions of fact propounded, and came to the following findings: (1) that there was no agreement to make monthly payments by way of instalments of the amount which had been advanced by the defendant to the plaintiff; (2) that there had been a complete contract for the purchase of 500 ordinary and 500 preference shares of the Premier Oil Mills Company

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in June, 1920, to be delivered in December following, and that it had been broken by the plaintiff; (3) that it was not proved that it was any part of the contract between the parties that the two accounts, namely, the purchase of francs and the purchase of Premier Oil Mills shares, should be adjusted together and the profits on one set off against the loss on the other; and (4) that it was not proved that the defendant had sent any letter on April 16, 1922, intimating that he would put an end to the "whole affair" after a fortnight if no reply was received thereto. The judgement then continued :—]

There is really no dispute as regards the facts relating to the transaction of the French francs. These were purchased by the defendant through the Alliance Bank of Simla for the plaintiff. [Their Lordships discussed the evidence and proceeded.]

We are, therefore, of opinion that the interest which had passed to the plaintiff in the francs, which had been purchased by him out of the amount advanced to him by the defendant, remained vested in him and the defendant's remedy was to recover the amount from the plaintiff by recouping himself out of the amount realized by the conversion of those francs.

As regards the transaction relating to the Premier Oil Mills shares we are of opinion that it did not pass beyond the stage of a mere contract, and that it had not become an out and out sale of those shares by the defendant to the plaintiff. The defendant, both in his oral evidence and in his letter dated the 4th of November, 1920, admitted that the shares would have to be taken over in the month of December. The defendant in June, 1920, possessed 500 ordinary and 2,000 preference shares of the Premier Oil Mills Company. The contract was to purchase 500 ordinary and 500 preference shares.

The defendant has admitted in his evidence that he was prepared to sell 500 ordinary shares at a reduced price simply because the plaintiff was prepared to purchase the 500 preference shares. Thus the contract of sale of those two sets of shares was one and the same, though the rates for the two were separately mentioned. It is impossible to hold that these two constituted two separate contracts and not one contract. The learned advocate for the defendant has to concede that so far as 500 preference shares are concerned they could not be said to have been definitely ascertained goods at that time when the defendant in fact possessed 2,000 such shares. So long as the share certificates were not delivered and the numbers were not specified they remained unascertained, and it would have been open to the defendant to hand over any 500 out of the 2,000 shares possessed by him. As regards the 500 ordinary shares, no doubt the defendant had only that number at that time, but as the delivery was to take place in December it would have been open to the defendant to hand over any other 500 ordinary shares which he might acquire before that date to the plaintiff. It is, therefore, not possible to hold that even the 500 ordinary shares which the defendant would sell to the plaintiff were definitely ascertained in June, 1920. We would also hold that such contract for the sale of two sets of shares was one and the same, and so long as part of the goods had not been definitely ascertained the whole must be deemed not to have been completely ascertained at the time when the contract was entered into. The price, however, was fixed.

As regards the breaches of the contracts, we are of opinion that, there being no contract for the payment of any instalment, there was no breach by the plaintiff of the contract up to April, 1922, in connection with the purchase of francs. As regards the contract for the purchase of the Premier Oil Mills shares, we are

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of opinion that there was a definite breach committed by the plaintiff in December, 1920, when he failed to take over the shares, and in any case, even assuming that time was not of the essence of the contract, there was undoubtedly a breach committed on the 22nd of February, 1921, when the plaintiff definitely denied that he had entered into any such contract. On our finding that there was no contract to adjust the two accounts, it is obvious that the defendant was bound to treat the two transactions separately, although as a net result he might deduct, before making actual payment, what was due to him on one transaction from what would be due from him on the other.

The learned advocate for the plaintiff contends that there being no actual sale of the Premier Oil Mills shares but only a contract, it was the duty of the defendant, when the contract was repudiated or broken, to reduce the loss by re-selling the shares in open market, and accordingly the defendant can only claim the difference between the contract price and the price which these shares would have fetched in open market on the date when the breach was committed by the plaintiff. His argument is that the defendant was not entitled to wait for two years longer and then claim to deduct the difference between the contract price and the price which then prevailed, from the profit which the plaintiff had made on the transaction of francs. He is prepared to concede that a mere failure to take over delivery of shares in December might not amount to a breach, and contends that at the best the breach took place on the 22nd of February, 1921, when the transaction was repudiated by the plaintiff. What the defendant has done is to settle the account privately at home and to allege that over Rs. 6,000 were due to him which he was prepared to forgo. He has not filed any statement of account which would show that his calculation was correct.

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On the other hand, the learned advocate for the defendant has argued that under section 78 of the Indian Contract Act the sale was complete by mere offer and acceptance, inasmuch as both delivery and payment were to be postponed to a future date.

Section 28 of the Indian Companies Act (Act VII of 1913) provides that the shares or other interest of any member in a company shall be movable property, transferable in manner provided by the articles of the company. Section 17 authorizes a company to frame articles of association and adopt all or any of the regulations contained in Table A in the first schedule. No regular and certified copy of the articles of association of the Premier Oil Mills Company having been produced, though called for, in the absence of anything to show to the contrary we presume that the regulations contained in Table A of the first schedule attached to the Indian Companies Act govern this company also. If it was the defendant's case that this company had in any way modified or altered those regulations, it was undoubtedly his duty to prove that this was so. Regulation 18 provides that the instrument of transfer of any share in the company shall be executed both by the transferor and the transferee and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof. Regulation 19 provides that the share shall be transferred in a particular form. Regulation 20 authorizes the directors to decline to register any transfer of shares, *not being fully paid shares*, to a person of whom they do not approve, and may also decline to register any transfer of the shares on which the company has a *lien*. The learned advocate for the plaintiff contends that the Companies Act is a Special Act and provides a special mode of transfer of shares of the company, and that unless that method is adopted no transfer in law takes

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place. He also contends that the Regulations being part of the law by virtue of section 28, the transferor must be deemed to remain holder of the share until the name of the transferee is entered in the register. On the other hand, the contention on behalf of the defendant is that these regulations and articles of association are meant for the management of the company itself and they govern the members of the company, but that they do not in any way affect the rights of private dealings as between the transferor and the transferee, and that such rights are governed by the Contract Act. On behalf of the plaintiff reliance has been placed on several English cases and particularly on the case of *London Founders Association* v. *Clarke* (1), where it was laid down that in a contract for the sale of the shares of a company there was no implied covenant that the transferee's name would be registered by the directors of the company. Similar observations are to be found in the cases of the *Muir Mills Co. Ltd. of Cawnpore* v. *T. H. Condon* (2) and *Bahadur Singh* v. *Shiam Sundar Tug* (3). On the authority of these cases it is contended that the registration by the company is a subsequent act which in no way affects the completion of the sale of the shares. We might point out that to say that the registration of the transferee's name is no part of the contract between the transferor and the transferee, is not the same thing as saying that sale can take place even without registration. If the transferor does not undertake to get the name of the transferee registered, and indeed when the objection to the registration of the transferee's name may be on account of the directors' disapproval of him, there may not be any such implied undertaking. The question to be considered really is whether a sale can take place before the registration, or even before any instrument of

(1) (1888) L.R., 20 Q.B.D., 576. (2) (1900) I.L.R., 22 All., 410.
(3) (1914) I.L.R., 36 All., 365.

transfer is executed or the share certificates are handed over to the transferee. The learned advocate for the appellant has drawn our attention to the case of *Nanney* v. *Morgan* (1), where it was held that non-compliance with the rules of the company for the complete transfer of a share prevented the share from *legally vesting* in the transferee, though belonging in equity to him. Our attention was also drawn to Buckley on the Companies Act, 10th edition, page 586, where it is stated that a transfer not in compliance with the requirements of the articles of association carries to the person whose name is subsequently filled in as transferee not only the equitable but also the legal interest, meaning the legal right to call upon the company to register the transfer, but there is no legal title to the share until registration.

In our opinion it is not absolutely necessary in this case to decide the general question whether if there were a conflict between the Contract Act and the Companies Act the latter should prevail, or whether the sale of shares can take place between the transferor and the transferee under the Contract Act, while no such sale can be recognized under the Companies Act. As pointed out by us, this is a case where the goods were not definitely ascertained in June, 1920, when the contract was made. Even under section 78 of the Indian Contract Act no sale can be effected by mere offer and acceptance, even for a definite price, when the goods have not been ascertained. Section 82 clearly provides that where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained. The illustration to that section also makes it clear that even if the goods exist but are mixed up with other goods of the transferor, there is no ascertainment so long as they have not been separated and ear-marked. In the case of *Jamil* v. *Moolla Dawood Sons and Co.*, (2), where shares of the British

(1) (1887) 37 Ch. Div., 346. (2) (1887) I.L.R., 43 Calc., 493.

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Petroleum Co. Ltd. had been contracted to be sold, their Lordships of the Privy Council at page 503 remarked "the seller was and remained the legal holder of the shares", and held that section 73 of the Indian Contract Act was but declaratory of the right to damages, which was based on the principle that in a contract for sale of negotiable securities the measure of damages was the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach; that it was the duty of the person claiming damages to take all reasonable steps to mitigate the loss consequent upon the breach and he could not claim as damages any sum which was due to his own neglect. But the loss to be ascertained is the loss at the date of the breach, and if at that date he could do something or did something which mitigated the damage, the other party was entitled to the benefit of it.

Still more clearly their Lordships have made the same pronouncement in the case of *Maneckji Pestonji Bharucha* v. *Wadilal Sarabhai & Co.* (1). At page 366 their Lordships remarked that it was quite true that the full property in shares in a company is only in the registered holder, and that an unregistered transferee had not a perfected right of property which he would have had if he had been the registered holder of the shares which he was selling; the company is entitled to deal with the share holder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. It was also held that the word "goods" as defined in the Indian Contract Act included every kind of movable property, including shares of a company, and that section 78 might therefore be applicable. In that case also the goods which

(1) (1926) I.L.R., 50 Bom., 360.

had been contracted to be sold were so many shares of Alcock Ashdown and Co. Ltd., deliverable in the following month, and not any particular shares. Their Lordships held that the goods were not ascertained goods at the time of the contract. But as soon as the broker handed over the certificates and the transferor and the transferee accepted them and gave a cheque, the goods became ascertained goods, and the sale was complete and the property passed.

In the present case we have already remarked that the goods were not ascertained at the time of the contract. The defendant has further admitted that the shares remained standing in his name, and that they were never transferred to the plaintiff's name and that the plaintiff also never received any dividend. The defendant on his own showing did not do all that he could have done, and neither executed any deed or instrument, nor got the shares transferred to the plaintiff. It is therefore impossible to hold that the legal title to the shares passed to the plaintiff and that the latter became the full owner thereof. The transaction really amounted to a mere contract and a breach of it was committed by the plaintiff.

In view of the provisions of section 73 and the observations of their Lordships of the Privy Council in the first case cited above, it is clear that the measure of damages would be the difference between the contract price and the market price at the time when the breach took place, and that it was the duty of the defendant to reduce the loss as much as possible. We are accordingly clearly of opinion that the defendant is not entitled to claim credit for the entire difference between the contract price and the price of those shares in April, 1922, more than one year after the breach. The defendant was only entitled to claim the difference between the contract price and the price of those shares on the 22nd of

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February, 1921, when the plaintiff repudiated the transaction, and declined to take those shares. If the defendant did not sell those shares in the market but kept them with him, he took the risk upon himself and he is not entitled to charge the plaintiff with the further loss which he suffered.

* * * *

We accordingly allow this appeal, and setting aside the decree of the court below pass a preliminary decree under order XX, rule 16, of the Code of Civil Procedure, calling upon the defendant to render account of the transaction of the purchase of francs to the plaintiff and to deduct from the amount due to the plaintiff any loss which he may have suffered on account of the breach of contract to purchase the Premier Oil Mills shares up to the 22nd of February, 1921. The actual account will be calculated before the final decree is passed and the parties will be at liberty to produce further evidence on the point. As regards costs, we are of opinion that inasmuch as neither party disclosed the whole truth before the court they should bear their own costs in the court below and costs in this Court up to this stage.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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CHHEDI RAM (DEFENDANT) *v.* GOKUL CHAND AND ANOTHER (PLAINTIFFS).*

Privacy—Existence of public lane between houses of parties not incompatible with existence of right.

The fact that there is a public lane between the two houses concerned is not incompatible with the existence of a right of privacy. *Kuvarji Premchand* v. *Bai Javer* (1), *Jamil-ud-din* v. *Abdul Majeed* (2), *Fazal Haq* v. *Fazal Haq* (3), and *Gokal Prasad* v. *Radho* (4), followed.

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*Second Appeal No. 1494 of 1925, from a decree of Rāj Behari Lal, Subordinate Judge of Ghazipur, dated the 29th of April, 1925, confirming a decree of Vishambhar Prakash, Munsif of Ghazipur, dated the 8th of September, 1924.

(1) (1869) 6 Bom. H.C.R., 143. (2) (1915) 13 A.L.J., 361.
(3) (1927) 26 A.L.J., 49 (4) (1888) I.L.R., 10 All., 358.