

1936

BISHEN CHAND
v.BAKSHISH
SINGH.

BHIDE J.

In the circumstances, I see no good reason to interfere with the order of the Courts below, but in view of the facts I leave the parties to bear their costs in this appeal.

P. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Skemp J.

BANWARI LAL (DEFENDANT) Appellant

versus

KUNDAN CLOTH MILLS, LTD. (PLAINTIFF)

Respondent.

1936

Dec. 23.

Civil Appeal No. 789 of 1936.

Indian Companies Act, VII of 1913 — Subscribers of Memorandum of Association — liability of — with respect to the call money on the shares subscribed — Improper reflections by Court — upon a whole class of society — not justified.

Held, that where a person has agreed to take up shares in a limited Company at the time of its formation and has subscribed the Memorandum of Association he is liable for call money on the shares subscribed, and his plea that he was induced to become a member by the misrepresentation of the promoter and that he repudiated his liability before the registration of the Company is of no avail to him, as there can be no contract with the *Company* until it has come into existence by the registration of its Memorandum of Association and Articles in the Registration office.

In re Metal Constituents, Ltd. — Lord Lurgan's Case (1), *Piara Singh v. Peshawar Bank, Ltd., in Liquidation* (2), *In the matter of J. H. Chandler and Co., Ltd., in Liquidation* (3), and *In re The Machine Exchange Co., Ltd., in Liquidation* (4), relied upon.

Held also, that although it may be necessary for a Judge or a Magistrate to pass reflections upon the conduct or honesty

(1) (1902) L. R. 1 Ch. D. 707.

(3) I. L. R. (1926) 48 All. 580.

(2) 54 P. R. 1915.

(4) I. L. R. (1888) 12 Bom. 311.

of a party or the truthfulness of a witness, it is not proper to make such remarks about a whole class of society who are not before the Court.

Second appeal from the decree of Sheikh Laiq Ali, Senior Subordinate Judge, Ludhiana, dated 17th April, 1936, affirming that of Lala Rameshwar Dayal, Additional Subordinate Judge, 4th Class, Ludhiana, dated 14th February, 1936, awarding the plaintiff Rs.500.

J. G. SETHI, for Appellant.

D. N. AGGARWAL, for Respondent.

SKEMP J.—This second appeal is against a judgment of the Senior Subordinate Judge, Ludhiana, affirming a decision by the trial Judge that the defendant was liable for call money in respect of shares which he had agreed to take up in a limited Company at the time of its formation. The defendant pleaded that before the registration of the Company he had repudiated liability for the shares; but the lower Courts relying on *In re The Machine Exchange Co., Ltd., in Liquidation* (1), overruled this contention.

Mr. Sethi has argued the second appeal on behalf of the defendant. The facts, as far as it is necessary to state them, are that a Company called the Kundan Cloth Mills was promoted by Mr. Kundan Lal of Ludhiana. The defendant Mr. Banwari Lal of Delhi signed the memorandum of association and wrote in his own hand that he would take 50 shares. According to Mr. Kundan Lal, he did so on the 18th January, 1933. The same day Mr. Kundan Lal brought the memorandum and articles of association to Lahore in order to have the Company registered. He took the

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papers for registration himself to the office of the Registrar of Joint Stock Companies on the 19th January, 1933. The Registrar was not there; Mr. Kundan Lal returned to Ludhiana on the 20th or 21st, where he got a telegram despatched on the 19th and a registered letter from Mr. Banwari Lal asking that his shares should be cancelled. He returned to the Registrar's office on the 22nd January, 1933, and the Company was registered on the 23rd. Mr. Banwari Lal says that he signed the memorandum a day or two earlier than the 18th, but the point is of no importance.

Mr. Sethi urges that Mr. Banwari Lal signed, on the representation that if after consulting his sons he wished to withdraw from the Company he might do so. He quoted *Piara Singh v. Peshawar Bank, Ltd., in Liquidation* (1), and other rulings in support of this contention.

The Lower Appellate Court found as a fact that there was no misrepresentation. It was, however, admitted by Mr. Kundan Lal that he had told Mr. Banwari Lal that if he did not wish to keep his shares he would transfer them to some one else or take them himself. The shares, however, cannot be transferred until the original call money is paid.

Out of the authorities quoted on behalf of the respondent Company by Mr. D. N. Aggarwal, who argued the case very well, that which gives the reason of the matter most clearly is an English case—*Lord Lurgan's Case* (2). Lord Lurgan had signed the memorandum of association for 250 shares before the Company went into liquidation. He then urged that he had been induced to take the shares by untrue representations made by one of the promoters named Sims. Buckley J. said:—

(1) 54 P. R. 1915.

(2) (1902) L. R. 1 Ch. D. 707.

“ Is Lord Lurgan entitled to rescission of his contract to take shares on the ground of the assumed misrepresentation? I think not. Before the incorporation of the Company Sims was not the agent of the Company, because the Company did not exist, and therefore Lord Lurgan could not have been induced to sign for the shares by the misrepresentation of the Company or its Agent. The contract of the subscriber of a memorandum of association is of a very peculiar kind. Down to the moment when the memorandum and articles are taken to Somerset House to be registered there is no contract at all, because the corporation does not exist, and any contract by the signatories must be with the corporation. At the moment of registration two things take place by force of the Companies Act, 1862—the Company springs into existence, and the subscribers to the memorandum of association become, by virtue of section 23 of that Act, members of the Company. There is no executory contract which is subsequently executed. There is no contract at all until the moment when the corporation and the character of membership in the signatories to the memorandum come simultaneously into existence. I must, therefore, hold that the subscriber to the memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentations of an agent of the Company.” Again he said, “ The contract effected by signature of the memorandum and registration of the Company is not merely a contract created between the subscriber and the Company. It is a contract whose existence is the basis of the creation of the corporation as one of the contracting parties, and every other person who becomes a member becomes such on the footing that that contract exists.”

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I quote this case because as pointed out by Sir Shadi Lal in *Piara Singh v. Peshawar Bank, Ltd. in Liquidation* (1) and also by Mukerji J. in *In the matter of J. H. Chandler and Co., Ltd., in Liquidation* (2) the law on the point is the same in India as in England. Sir Shadi Lal said that he had "consulted the decisions of the English Courts which contain a lucid exposition of the law, and which should be followed by the Courts in India in so far as the Indian Statute is not at variance with the law obtaining in England." *In re The Machine Exchange Co., Ltd., in Liquidation* (3) was followed by Mukerji J. in *In the matter of J. H. Chandler and Co., Ltd., in Liquidation* (2). The judgments cited by Mr. Sethi in support of his contention all deal with applications for shares made after the Company has been registered, which are governed by entirely different principles.

I, therefore, dismiss this second appeal with costs.

There is, however, one other point. The Senior Subordinate Judge in the course of his judgment said, "His (*i.e.*, defendant's) way of writing (as for example in Exhibit P.1) is sneaking and cringing. He wants, like people of his caste, to earn money and throw risks on others' shoulders." Mr. Sethi asks that these sentences should be expunged. The request is not opposed by Mr. Aggarwal, who indeed supports it.

I have had Mr. Banwari Lal's letter exhibit P.1 read out; it might possibly be called obsequious or wheedling but it does not justify the terms sneaking or cringing. As for the other sentence, reflection on all members of Banwari Lal's caste is entirely unjustified.

(1) 54 P. R. (1915). (2) I. L. R. (1926) 48 All. 580.

(3) I. L. R. (1888) 19 Bom. 311.

I do not know what Banwari Lal's caste may be. It is not stated in the English papers put up in the second appeal and though it might be easily ascertained from the plaint I have studiously abstained from doing so. Not knowing his caste I say that the remarks are entirely unjustified. It may be necessary for a Judge or a Magistrate to pass reflections upon the conduct or honesty of a party or the truthfulness of a witness; when this is necessary it should be done in sober and becoming language. It is never necessary to make remarks about a whole class of society who are not before the Court. Remarks such as that made by the Senior Subordinate Judge cause legitimate resentment, and I direct that these two sentences be now expunged from the judgment.

A. N. C.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Din Mohammad J.

HUSSAIN BAKHSH (COMPLAINANT) Petitioner

versus

KHUDA BAKHSH (ACCUSED) Respondent.

Criminal Revision No. 953 of 1936.

Indian Penal Code, Act XLV of 1860, section 403 : Criminal misappropriation — whether triable by the Magistrate having jurisdiction where accused resides — Criminal Procedure Code, Act V of 1898, section 181 (2) — Presumption that accused has retained the property at his residence.

Held, that in the case of an offence under section 403, Indian Penal Code, even in the absence of any evidence on the point, it will be fair to presume that the accused retained the property which is the subject of the offence, at the place where he resides. And the Court of that place will, therefore, have jurisdiction to try the offence.

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