ORIGINAL CIVIL.

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

1917.
April 4.

NAROTTAM MORARJI GOKULDAS AND OTHERS APPELLANTS (PLAINTIFFS) *v.* THE INDIAN SPECIE BANK, LIMITED IN LIQUIDATION), RESPONDENT (DEFENDANT).*

Company—Banking Company—Sale of shares through Company—Shares unsold through the misconduct of the Managing Director of the Company—Misrepresentation by the Managing Director that the shares were sold—Money paid to the share-holder as the price of the shares—Company going into liquidation—Share-holder as the registered owner of shares, placed on list A of contributories—Payment of calls in liquidation by the share-holder—Suit by the share-holder to recover back the amount of calls paid—The Indian Companies Act (VI of 1882), section 61, Cl. (g).

Plaintiff No. 1, through his nominees. plaintiffs nos. 2 to 4, was the owner of 161 shares in the Indian Specie Bank, Limited. In April 1913, upon instructions from the plaintiff No. 1, the share certificates and blank transfers executed by the nominal registered holders of the shares were handed to the Managing Director of the Specie Bank who undertook to sell the shares on commission. In May 1913, the Managing Director without selling the shares paid in respect of them a sum of Rs. 10,500, being approximately the equivalent of the net sale-proceeds of the shares at Rs. 66 per share, and he falsely represented to the plaintiffs that the shares had been sold at that figure. In December 1913, the Specie Bank went into liquidation. Plaintiffs Nos. 2 to 4 were thereafter placed upon list A of contributories in respect of the shares standing in their name on behalf of plaintiff No. 1 on the ground that they remained registered share-holders. In the liquidation proceedings, plaintiff No. 1 was obliged to pay the amount of calls made aggregating in all Rs. 8,050 with interest up to payment amounting to Rs. 219. Plaintiff No. 1 subsequently filed this suit to recover back the sums paid by him on the ground that the Managing Director in the course of his employment was guilty of neglect and misconduct towards the plaintiffs in not selling the said shares, and that the direct consequence of such neglect and misconduct had been that plaintiffs Nos. 2 to 4 were placed upon list A instead of list B with the result that plaintiff No. 1 had to pay the calls on the shares.

Held, that the plaintiffs had no cause of action, inasmuch as share-holders of a company contract to contribute a certain amount to be applied in payment of the debts and liabilities of the Company, and it is inconsistent with their position as share-holders, where they remain as such, to claim back any of that money.

* O. C. J. Appeal No. 69 of 1916.

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Houldsworth v. *City of Glasgow Bank*[1] and *In re Addlestone Linoleum Company*[2], referred to.

THE defendant Bank was a Joint Stock Company registered under the Indian Companies Act VI of 1882 and having its registered office in Bombay.

By an order made by the High Court at Bombay on the 19th December 1913 upon a petition presented on the 29th November 1913, the defendant Bank was ordered to be wound up, and Mr. J. Sanders Slater was appointed Official Liquidator thereof.

Prior to the time when it went into liquidation the defendant Bank undertook the selling of shares on commission, a Register being kept of securities handed to the Bank for sale.

In April 1913, the 1st plaintiff Narottam Morarji Gokuldas was the holder of 161 shares of the defendant Bank of the nominal value of Rs. 100 each, of which Rs. 50 on each share was paid up. 25 of the said shares stood in the name of the 2nd plaintiff, Kalyanrai Gulabrai Ghoda, 25 in the name of the 3rd plaintiff, Hurjivandas Vithaldas Motiwalla, and 111 in the name of the 4th plaintiff Kanialal Ranchhodbhai.

In April 1913, the 1st plaintiff left for England, and before he left he gave instructions to the 2nd plaintiff who was his Secretary to sell the said shares. In pursuance of the said instructions the 2nd plaintiff at or about the commencement of May 1913 took the certificates for the said shares with blank transfers duly signed to the defendant Bank and requested the Managing Director, Mr. Chunilal Dharamdas Saraiya, to sell the said shares on the usual commission. The defendant Bank through its said Managing Director took charge of the said certificates and transfers

[1] (1880) 5 App. Cas. 317. [2] (1887) 37 Ch. D. 191 at p. 198.

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and undertook the sale of the said shares on commission.

On the 13th May 1913, the 2nd plaintiff called at the defendant Bank and was informed by the Managing Director that the shares had been sold at Rs. 66 per share, but that only Rs. 6,000 was received on account of the price. This sum was paid by the defendant Bank to the 2nd plaintiff on the 22nd May 1913 and the 2nd plaintiff passed a receipt as follows :—

Bombay 22nd May 1913.

'Received from the Indian Specie Bank, Ltd., the amount of Rs. 6,000 only on account of part payment against shares of the Indian Specie Bank deposited for sale."

Rs. 6,000. (Sd.) Kalyanrai Gulabrai Ghoda.

On the 29th May 1913, the 2nd plaintiff was paid by the defendant Bank a further sum of Rs. 4,500 and the 2nd plaintiff passed a similar receipt for the same.

The gross sale price for the 161 shares at Rs. 66 per share amounted to Rs. 10,626. The 2nd plaintiff was paid in all a sum of Rs. 10,500. He was told by the Managing Director on the 29th May 1913 that an account of the transfer fees, stamp duty and defendant Bank's commission would be made up and sent to him with any balance that might be due. No account was sent, nor was any payment made.

In August 1913, dividend warrants in respect of the 161 shares were received by the 2nd, 3rd and 4th plaintiff. The 2nd plaintiff thereupon saw the Managing Director in reference thereto and the latter told him to bring the same signed by himself and the 3rd and 4th plaintiffs, respectively, as the shares had been sold and the purchasers were entitled to the dividends. The 2nd plaintiff thereafter handed over the dividend warrants duly signed to the Managing Director.

After the defendant Bank went into liquidation it transpired that the Managing Director of the Bank never in fact sold the said shares, being interested in keeping up the price of the Bank's shares in the market.

It further transpired in August 1913 that the Managing Director caused false entries to be made in the books of account of the defendant Bank purporting to show that the moneys paid to the 2nd plaintiff were advances of interest at the rate of 6 per cent. per annum. The sums of Rs. 6,000 and Rs. 4,500 were originally debited in the Bank's book to suspense account and subsequently credited to suspense account and debited to the plaintiff in the Miscellaneous Ledger as if the money had been advanced by the Bank as a loan on the security of the shares. The amount of the dividends collected was also credited to the plaintiff's account in the Miscellaneous Ledger. After the Bank went into liquidation the 2nd, 3rd and 4th plaintiffs were placed on the list A of contributories by the Liquidator. Their claim to be removed from the list A was disallowed by the Court in the liquidation proceedings.

The Liquidator under the order of the Court made a call of Rs. 50 per share. The 1st plaintiff paid Rs. 8,250 in respect of the 161 shares in which he was beneficially interested.

The plaintiff subsequently brought the suit to recover the said amount on the ground that the defendant Bank became their agent for sale of the shares in May 1913 and that on account of the neglect and misconduct of the Bank's Managing Director in the course of his employment the shares were not sold and that the direct consequence of such neglect and misconduct had been that the 2nd, 3rd and 4th plaintiffs were placed upon list A instead of list B and that the 1st plaintiff had been obliged to pay the calls.

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The defendant Bank through the Official Liquidator disputed the fact that the shares had been deposited for sale and pleaded that there was no contractual relation between the Bank and the 1st plaintiff, that the 1st plaintiff had no cause of action against the Bank, that no loss was suffered by the 2nd, 3rd and 4th plaintiffs as a direct consequence in law of the alleged neglect and misconduct if any, and that according to law and practice the 2nd, 3rd and 4th plaintiffs were rightly placed upon list A of contributories for payment of calls.

The suit came on for hearing before Mr. Justice Macleod who held that the Managing Director of the defendant Bank falsely represented to the 2nd plaintiff that the shares had been sold but that the direct consequence of such misrepresentation was not the liability to pay calls in the liquidation proceedings which were due to the Bank having suffered losses and the Bank's assets not being sufficient to pay the creditors in full. The suit was accordingly dismissed by the learned Judge who delivered the following judgment.

MACLEOD, J.:—The first plaintiff was the owner of 161 shares in the Indian Specie Bank which were held for him in the names of the 2nd, 3rd and 4th plaintiffs. In April 1913, as he was leaving for Europe he directed the 2nd plaintiff, his Secretary, to sell the shares. He had only receipts for the certificates which had remained with the Bank ever since the shares had been bought in 1910. On the 17th May, the 2nd plaintiff took these receipts with blank transfers duly signed to Chunilal, the Managing Director of the Bank, and asked him to sell the shares. It was part of the Bank's business to sell shares for their customers and a Register was kept of securities handed to the Bank for sale. Chunilal said the Bank would sell the shares and asked 2nd plaintiff to come back in a few days.

On the 22nd May, he went to the Bank and was told the shares had been sold at Rs. 66 and was paid Rs. 6,000 on account for which he passed a receipt. He was asked to come back in a few days when the account would be settled. He returned on the 29th when he received a further sum of Rs. 4,500 and passed a receipt in the same form as before. The gross sale proceeds were Rs. 10,626 and a rough calculation was made of expenses for stamps and transfer fees but it does not seem that the exact amount was arrived at, as the amount of stamps required depended on the number of shares sold on each transfer. As a matter of fact 2nd plaintiff never went back to have the account settled. The sums of Rs. 6,000 and Rs. 4,500 were debited in the Bank's books to suspense account. On the 6th August, they were credited to suspense account and debited to the plaintiff in the Miscellaneous Ledger as if the money had been advanced by the Bank as a loan on security of the shares. In August, warrants for dividend on the shares for the half year ending the 30th June were sent to plaintiffs Nos 2, 3 and 4. The 2nd plaintiff took these to Chunilal who asked him to get them signed and returned to him as the purchasers were entitled to the dividends. As a matter of fact the amount of the dividends was credited to the plaintiff's account in the Miscellaneous Ledger. After the Bank went into liquidation plaintiffs Nos. 2, 3 and 4 were placed on the list of contributories by the Liquidator and they then discovered that the shares had never been sold so that their names still remained on the Register of share-holders. Their claim to be removed from the list was disallowed and when the Liquidator under an order of the Court made a call of Rs. 50 per share the first plaintiff had to pay Rs. 8,250.

The plaintiffs have now filed this suit to recover that amount on the ground that the Bank became their agent

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for the sale of the shares and on account of the neglect and misconduct of the Bank's Managing Director the shares were not sold, so that as the direct consequence of that neglect and misconduct they had to pay the Liquidator the amount of the call. The Liquidator in his written statement disputed the facts which I have set out, relying on the entry in the Miscellaneous Ledger, but considering the entry in the Register of shares lodged with the Bank for sale and the receipts given to the Bank for the payments of Rs. 6,000 and Rs. 4,500 it cannot possibly be contended that the Bank made a loan on the security of the shares. It has also been contended that because in the Register the column "Rate at which the shares are to be sold" was not filled in in ink with "Market rate" but contained an entry in pencil " ask the Sheth", the plaintiffs lodged the shares to be sold only when Chunilal thought fit. I believe the evidence of the 2nd plaintiff and reject this contention. It is common knowledge now that Chunilal was interested in keeping up the price of the shares and it did not suit him to put these on the market. I think that when the 2nd plaintiff asked Chunilal to sell the shares without fixing any limit it cannot be taken that it was not implied that the shares should be sold at the market rate, but the question is immaterial as I am satisfied that Chunilal represented to the 2nd plaintiff that the shares had been sold.

It is not suggested that Rs. 66 was not the proper market value of the shares in May 1913.

The direct consequence, therefore, of Chunilal's conduct was that the plaintiffs had got the money value of the shares while they still remained the owners of them. Mr. Desai admitted that if it was a question only of negligence on the part of the agent, the plaintiffs could not recover what they had to pay to the Liquidator

as contributories and that seems clear from the case of *Neilson* v. *James*[1] where, through a broker's negligence in failing to make a complete contract for sale of certain shares the purchaser repudiated the transaction so that the seller did not get the purchase price and had to pay calls which were afterwards made on the shares. He was held entitled to recover from the broker the purchase price but he gave up his claim for the amount which he had to pay for calls. The learned Judges in appeal were unanimously of opinion that the plaintiff had acted wisely in so doing. But Mr. Desai argued that as Chunilal was guilty of misrepresentation the damages suffered by the plaintiffs must be assessed on a different basis. But even in the case of fraudulent misrepresentation there must be a natural and proximate connection between the wrong done and the damages suffered: see per Thesiger L. J. in *Waddell* v. *Blockey*[2]. Blockey had represented to one Peter Lutscher that it would be profitable to buy 5½ per cent. rupee paper and was authorised to buy to the extent of £ 2,00,000. Lutscher thought that Blockey was buying for him in the ordinary course on the Stock Exchange. As a matter of fact Blockey was selling his own rupee paper. Prices fell and Lutscher sold after five months at a loss of £43,000. The action was brought by Lutscher's trustee under a liquidation by arrangement. It was held by the appeal Court that Lutscher's ultimate loss was not the proper measure of damage. He voluntarily retained the paper and if he elected to remain owner after the paper began to fall in price his loss was not owing simply to his having purchased it but to his having purchased and retained it. The plaintiff was entitled to the difference between the purchase price and the price he would have realised if he had resold it in the market forthwith after purchasing

[1] (1882) 9 Q. B. D. 546. [2] (1879) 4 Q. B D. 678 at p. 682.

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it. Or according to Baggallay L. J. the damages might have been assessed upon the basis of the difference between the price the insolvent paid and the price at which he might have bought in the market assuming he could have bought at a lower rate.

Now the direct consequence of Chunilal's misrepresentation was that the plaintiffs Nos. 2, 3 and 4 remained the owners of the shares in the Bank's Register. They had got their money and therefore there was no loss to them in so remaining owners. Ostensibly they had got Rs. 10,500 for nothing. The real measure of damages would be the difference if any between Rs. 10,500 and the amount that would have been realised by an actual sale. The liquidation was due to the Bank having suffered losses and the call ordered by the Court was due to the facts that the Bank's assets were not sufficient to pay the creditors in full. Supposing they had been sufficient and there had even been a surplus the plaintiffs would have been entitled to share with the other share-holders.

I may also add that the 2nd, 3rd and 4th plaintiffs had direct notice that their names remained on the Register long after they thought the shares had been sold, at any rate, when the dividend warrants were sent to them in August. The 2nd plaintiff is an educated and intelligent man, and he at least ought to have known that dividend warrants are made out in the names of those whose names appear on the Register when the transfer books are closed prior to the payment of a dividend.

It would be a very strange contradiction if the plaintiffs having been placed upon the list of contributories in spite of certain facts and having paid the call, should be entitled on the same facts to recover the amount so paid to the liquidators in an action.

I think the Liquidator was wrong in contesting the facts and in relying on an obviously false entry in the Miscellaneous Ledger. The matter could well have been brought before me on a case stated. Therefore I dismiss the suit without costs.

The plaintiffs appealed.

Strangman (Advocate General) with *Inverarity*, *Setalvad* and *Desai* for the appellants:—The direct consequence of the wilful misrepresentation of the Managing Director of the defendant Bank was that the plaintiffs continued to be the owners of shares on the Register of the Company and as such were obliged to pay calls. The case is not merely one of negligence of an agent as in *Neilson* v. *James*[1]. Damages in a case of fraudulent misrepresentation should be assessed on a different basis.

Weldon with *Mulla* for the respondent:—The liability to pay calls was not the *direct* consequence of the failure to sell the shares. The Company may or may not have gone into liquidation. The liquidation was due to the Bank having suffered losses. The call ordered by the Court was due to the facts that the Bank's assets were not sufficient to pay the creditors in full. If the assets had been sufficient and there was a surplus the plaintiffs would have been entitled to share with the other share-holders.

There is no natural and proximate connection between the wrong done and the damages suffered: see *Neilson* v. *James*[1]; *Waddell* v. *Blockey*[2]; *Houldsworth* v. *City of Glasgow Bank*[3] and *In re Addlestone Linoleum Company*[4]: see ills (*a*) and (*d*) to section 212 and ill. (*n*) to section 73 of the Indian Contract Act: see also section 61 (*g*) of the Indian Companies Act of 1882.

(1) (1882) 9 Q. B. D. 546.
(2) (1879) 4 Q. B. D. 678 at p. 682.
(3) (1880) 5 App. Cas. 317.
(4) (1887) 37 Ch. D. 191 at p. 198.

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Lastly, the plaintiffs had notice in August 1913 that they remained as share-holders on the Register of the Company.

SCOTT, C. J. :—The 1st plaintiff, through his three nominees, the 2nd, 3rd and 4th plaintiffs, was the owner of 161 shares in the Indian Specie Bank. In the month of April 1913, upon instructions from the 1st plaintiff, the share certificates and blank transfers executed by the nominal registered holders of the shares were handed to the Managing Director of the Specie Bank who undertook to sell the shares on commission. The Managing Director, in the month of May, paid in respect of the shares a sum of Rs. 10,500 which would be approximately the equivalent of the net sale-proceeds of the shares at Rs. 66 per share, and he represented that the shares had been sold at that figure. The Specie Bank went into liquidation in or about the month of December 1913. The 2nd, 3rd and 4th plaintiffs were thereafter placed upon list A of contributories in respect of the said shares standing in their names on behalf of the 1st plaintiff, on the ground that they remained registered share-holders. It is not disputed that the representation of the Managing Director of the Bank that the shares had been sold was false. In consequence of the shares not having been sold, the 1st plaintiff has been obliged to pay the amounts of the calls made in the liquidation aggregating in all Rs. 8,050 with interest up to payment amounting to Rs. 219 and these sums he seeks to recover from the Bank in liquidation on the ground that the Managing Director in the course of his employment by the defendant Bank was guilty of neglect and misconduct towards the plaintiffs in not selling the said shares, and that the direct consequence of such neglect and misconduct has been that the 2nd, 3rd and 4th plaintiffs were placed upon list A instead of list B, and that the 1st plaintiff has been obliged to pay the

calls on the said shares as aforesaid; and that in any event the plaintiffs have been deprived of their rights to indemnity against a purchaser.

The suit was dismissed in the trial Court on the ground that the plaintiffs had received full consideration for the shares, and that there was no loss to them in so remaining owners. The learned Judge remarked:

"It would be a very strange contradiction if the plaintiffs having been placed upon the list of contributories in spite of certain facts (brought to the notice of the Court at the time of settling the list), and having paid the calls, should be entitled on the same facts to recover the amounts so paid to the liquidators in an action."

In our opinion the plaintiffs have no cause of action. According to the decision of the House of Lords in *Houldsworth* v. *City of Glasgow Bank*[1] (an action based upon misrepresentation) a share-holder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the Company, and it is inconsistent with his position as a share-holder, where he remains as such, to claim back any of that money. He must not directly or indirectly receive back any part of it.

The same principle was applied in *In re Addlestone Linoleum Company*[2], where persons upon being registered as share-holders sought to recover as damages for breach of contract or otherwise in respect of the issue of fully paid up shares the amount which they had had to pay as contributories in the winding-up upon shares which were not in fact fully paid up. Mr. Justice Kay, whose decision was affirmed in the Court of Appeal, observed:

"Practically, what these applicants are seeking to recover by their proof is a dividend in respect of the £ 2-10*s.* per share which they have been compelled to pay in the winding-up. But as share-holders they have contracted that they will pay this money, and that it shall be first applied in payment of the creditors

1 (1880) 5 App. Cas. 317. (2) (1887) 37 Ch. D. 191 at p. 198.

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whose debts are not due to them as members of the Company—that is, they are practically admitting their liability to pay the £ 2-10s. per share to such other creditors and yet seeking to get part of it back out of the pockets of those very creditors themselves. I confess it seems to me that the money so claimed is not only claimed in the character of members but that the claim is just as unreasonable as if it were a claim of dividends or profits, and that, accordingly, it comes within the words 'or otherwise', which I have read from section 38."

Section 38 corresponds with section 61 of the Indian Companies Act of 1882. Sub-section (*g*) of that section is as follows:—

"No sum due to any member of a Company in his character of a member, by way of dividends, profits or otherwise, shall be deemed to be a debt of the Company payable to such member in a case of competition between himself and any other creditor not being a member of the Company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves."

In the case of the Specie Bank there is no probability that the assets will ever suffice to pay the claims of the creditors in full, and therefore, there is no chance of any final adjustment of the rights of contributories amongst themselves. It is improbable having regard to the decision of the Master of the Rolls in *Burgess's case*[1] that even if there were surplus assets, the plaintiff would be entitled to recover in respect of his present claim.

We dismiss the appeal with costs.

Solicitors for appellants: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

Solicitors for respondent: Messrs. *Little & Co.*

Appeal dismissed.

G. G. N.

(1) (1880) 15 Ch. D. 507.