

Privy Council Appeal No. 52 of 1939

Societe Belge de Banque S.A. - - - - - *Appellant*

v.

Rao Girdhari Lal Chaudhary - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 18TH MARCH, 1940

Present at the Hearing :

LORD ATKIN

LORD THANKERTON

LORD PORTER

[*Delivered by* LORD ATKIN]

This is an appeal from the High Court at Lahore who reversed a decree of the Subordinate Judge at Delhi in favour of the plaintiffs, the present appellants. The circumstances in which the plaintiffs' claim arose are as follows. The defendant was chairman of The Delhi Sugar Mills Limited, an Indian company which carried on business at New Delhi. The company, before December, 1933, had had dealings with a Belgian company Messrs. Atelier de Construction de J. J. Gillains, who may be called the contractors, who had been engaged in providing equipment for the company and held shares in the company. Apparently in December, 1933, it was desirable for the company to obtain further financial assistance as they were contemplating making an addition to their factory, and for that purpose were acquiring a lease of a site which it was proposed should be mortgaged presumably to the contractors. Negotiations were opened between the defendant and the plaintiffs, a Belgian bank. The plaintiffs were bankers of the contractors and were represented at New Delhi by Mr. Van Campenhout, the general attorney of the bank, and Mr. Delait, the manager of their office. The contractors were represented by Mr. Palante who was their general attorney in India, and was also a director of the company. On 27th December, 1933, a meeting took place at the bank's office at Delhi at which Mr. Van Campenhout and Mr. Delait, representing the bank, Mr. Palante, representing the contractors, and the defendant were present. Terms were

arranged and were expressed in a letter signed by the defendant and addressed to Mr. Van Campenhout. The letter is in the following terms:

" Delhi:

Dated the 27th December, 1933.

A. J. Van Campenhout, Esquire,
Attorney of Societe Belge de Banque, S.A.,
Bruxelles:
Swiss Hotel, Delhi.

DEAR SIR,

In continuation of our conversation regarding the question of the transfer of shares held by Messrs. J. J. Gillains in the Delhi Sugar Mills, Limited, in favour of Societe Belge de Banque S.A. (which question is being dealt with separately), I have the pleasure to inform you that I agree to sell 250 fully paid-up shares standing in my personal name to your bank on the following conditions:—

(i) That this sum of Rs.25,000 will be expended by you in securing the lease of the factory site and in paying the Company's half share of the costs of securing the mortgage-deed of the factory, etc., in favour of Messrs. J. J. Gillains and the cost of the transfer of the said shares. Whatever balance is left over will be paid to the Delhi Sugar Mills, Limited.

(ii) The sum of Rs.25,000 stated above, will thus be treated as a loan to the Company from me.

(iii) That an interest of 6½ per cent. will be paid by the Company on this loan which will be transferred to your Bank.

(iv) That the Bank will not be entitled to any dividend on these shares and will have only the right to the interest as stated in clause (iii).

(v) That I guarantee to re-buy at the same price these shares within six months and that the Bank will guarantee to re-sell to me these shares at any time I like within the stipulated period of six months.

(vi) Should I fail to re-buy these shares by the end of this period, and/or to pay the interest, the Bank will have the right to sell the shares to anybody else, and to claim from me damages, if any, and to keep the dividend. The dividend, if any, earned on these shares within the next six months will be transferred by the Bank to me after the same has been received from the Company.

(vii) That you will obtain Messrs. J. J. Gillain's consent to this transaction.

Yours faithfully,

GIRDHARI LAL."

The letter was acknowledged by a letter of the same date signed by Mr. Van Campenhout and handed personally to the defendant. Mr. Palante had at the meeting assented to the transaction. The acknowledgment is as follows:

" Delhi:

Dated the 27th December, 1933.

Girdhari Lal Chaudhary, Esquire,
Chairman,
Delhi Sugar Mills, Limited,
New Delhi.

DEAR SIR,

I beg to acknowledge with thanks your letter of date, and to confirm that the S.A. Societe Belge de Banque S.A. agree to

purchase from you 250 fully paid shares standing in your name of the Delhi Sugar Mills, Limited, on the following conditions:—

1. That the purchase price of Rs.25,000 for the said shares will be expended by us in securing the lease of the factory site and in paying the Company's half shares of the costs in securing the mortgage-deed of the factory, etc., and the cost of the transfer of the said shares. Whatever balance remains after the above expenditure, will be paid to the Delhi Sugar Mills, Limited.

2. The said sum of Rs.25,000 will then be treated as a loan to the Company from you.

3. The Company will pay interest at the rate of 6½ per cent. on the said loan and this interest will be transferred by you to our Bank.

4. You guarantee to buy back at the same price the said shares within six months and the Bank guarantees to re-sell the same to you at any time you like within the stipulated period of six months.

5. The Bank will not be entitled to any dividend on the said shares during the period of the six months, but will only have the right to the interest as provided in the clause (3).

6. Should you fail to re-buy these shares by the end of this period and/or to pay the interest the bank will have the right to sell the shares to anybody else and to claim from you the damages, if any, and to keep the dividend. The dividend, if any, earned on these shares within the next six months will be transferred by the Banque to you after the same has been received from the Company.

7. That we will obtain Messrs. J. J. Gillain's consent to this transaction.

8. The above transaction of purchasing the shares and paying the price of 25,000 will be carried out and completed after the draft mortgage has been approved and is ready to be engrossed and after the draft lease has been approved by the lessor, the Company and ourselves, and is ready to be engrossed.

Yours faithfully,

(Sd.) A. VAN CAMPENHOUT,

Belge de Banque, duly authorised agent."

On the same day a receipt for the letter was given by the defendant signed by the secretary of the company. By letters of the same day signed by the defendant as chairman for the company and addressed to Mr. Palante the company agreed to the assignment by the contractors to the bank of their rights against the company and also of their shares in the company. Both letters concluded that they were subject to the payment by the bank of Rs.25,000 in terms agreed between Mr. Girdhari Lal and the bank. On the same day also the defendant addressed to Mr. Van Campenhout a letter in which he says "will you please pay to the Delhi Sugar Mills Limited a sum of Rs.4,000 out of Rs.25,000 which has been earmarked for securing the lease of the factory site and for obtaining the mortgage-deed." The letter went on to say that it was understood that the remaining sum of Rs.21,000 would be enough to meet all these expenses: but that if there should be a shortage the defendant guaranteed that it would be made good by the company.

The bank duly paid the Rs.4,000 to the company who credited the sum to the defendant. At later dates they paid to the defendant Rs.17,440.12.9 for payment to the assignor of the lease, a sum which is again credited in the books of the company to the defendant. They paid further sums for the stamp on the assignment and costs of its preparation and for stamps on the mortgage-deed. The latter sum they eventually recovered, so that they finally expended on this transaction Rs.22,259.12.9. In the meantime the bank had been pressing the defendant to transfer to them the 250 fully paid shares which were the consideration expressed in the letters for the above payments by the bank. On 12th January, 1934, they tendered a draft transfer deed to the defendant asking him to have it engrossed with the number of the shares. It appears that at the date of the letters the shares issued to the defendant were not fully paid. Difficulties arose as to this: a certificate for 500 fully paid shares was said to have been issued by the company on 12th March. It purported to be signed by the defendant and the secretary, and also it is said by Mr. Palante, but Mr. Palante is said to have erased his signature and for that reason it was at one time said that it became impossible for the defendant to transfer 250 shares. Eventually after interviews and several letters asking for performance the plaintiffs in a peremptory letter dated 9th May required the defendant to settle the matter within 24 hours. No reply was forthcoming and on 11th May, the plaintiffs by their solicitors wrote cancelling the agreement and claiming the money they had paid under it. Credit for the mortgage stamp returned was not then available. The present suit is brought for the nett sum paid by the bank, and in the circumstances narrated it appears difficult to see how the defendant could succeed. The chief point made by the defendant which found favour with the Subordinate Judge and the High Court was that there never was a concluded agreement. Clause 8 of the bank's letter of 27th December, 1933, it is said, introduced a new term which prevented the letter from being an acceptance of the defendant's offer, and there is no evidence of an acceptance of the bank's counter offer. Without dealing with the last contention, against which there appears much to be said, their Lordships are satisfied that the paragraph relied on stated no new term but merely expressed what was necessarily implicit in the defendant's offer. How could the bank expend an unascertained amount in securing the lease of new premises until the terms of the lease had been approved between the lessor and the company? The approval of the terms by the bank in the circumstances was in contemplation of everyone. How could the costs of the mortgage be ascertained until the draft mortgage had been approved? Every circumstance points to the necessity of the condition expressed in the paragraph being necessarily intended by the defendant in his offer. It seems certain that money could not be paid for a lease unless the lessor and the lessee had come to a final agreement as to terms. But it was

said the bank were asked to promise to expend part of the Rs.25,000 "in securing the lease": and this involved an absolute promise by them to obtain the lease: hence a term that the expenditure was conditional upon the parties agreeing to the terms of the lease converted an absolute promise into a conditional one. The answer is that the promise asked for was not an absolute promise. This is a financial arrangement with a bank. How could they negotiate still less promise to succeed in negotiating a lease for a factory site in which the lessor as well as the lessee must always have the final word? "Expend in securing" obviously means expend "the money required to pay for" the lease. Their Lordships are therefore unable to agree with the conclusion of the learned Subordinate Judge accepted by the High Court in answer to the first issue that there was no concluded agreement. Their Lordships find it difficult to believe that there was not some misunderstanding on appeal as to the acceptance by counsel for the bank of all the trial judge's findings. But if counsel did accept such a finding it could only amount to an admission of a point of law which cannot be binding upon a court: and their Lordships do not consider themselves precluded from deciding the rights of the parties on a true view of the law

If then there was a concluded agreement it seems to matter little whether it was an agreement of purchase or of loan. Despite the initial words of the agreement which indicate purchase it seems difficult to resist the conclusion that the transaction was in truth a loan. The provision for payment of interest to the supposed purchaser on his supposed purchase price together with the agreement to buy back the shares in 6 months at the same price and the stipulation that the supposed seller is in the meantime to enjoy the profits of the property supposed to be sold point strongly in this direction. And it is to be noticed that in the correspondence the reference by the bank is to advances while in evidence the manager for the bank more than once styled the payments advances without any demur by the opposite party. But Mr. Pritt for the defendant, insisted that the transaction was one of purchase. If grown up men, he said, choose to call a transaction a purchase then it is a purchase, however inconsistent with such a legal conception are the agreed terms. But if it was a purchase then, in the circumstances of this case, the plaintiff's remedy is as simple as if it were a loan on security. The purchaser had paid the purchase price to the seller while the seller refused to deliver the goods agreed to be sold. On cancelling the bargain the purchaser was plainly entitled to recover the money he had so paid. And obviously it makes no difference whether the price had been paid to the seller direct or to third persons by his direction. If the transaction were a loan the borrower agreed to borrow money on the security of shares which he undertook to deliver to the lender. He refused to deliver them and the lender in cancelling the transaction is entitled to recover the money which he has advanced.

In the view of the transaction which has been adopted above it becomes unnecessary to consider the legal results which would follow if the negotiation had still remained open. Their Lordships must, however, not be taken to concur in the conclusion arrived at by the High Court, and they may remark that the provisions of s. 70 of the Indian Contract Act seem to have been overlooked in both courts. They can find no ground for styling the alleged contract a contract of guarantee as was stated in the High Court judgment. The letters and all the material documents indicate that the defendant and the defendant alone was to be the principal debtor.

In the result their Lordships agree with the decree passed by the trial judge though for a different reason. They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court at Lahore dated 1st November, 1937, be set aside and the decree of the Subordinate Judge Delhi dated 22nd December, 1936, be restored. The defendant must pay the costs of the appeal to the High Court and to His Majesty in Council.



In the Privy Council

SOCIETE BELGE DE BANQUE S.A.

v.

RAO GIRDHARI LAL CHAUDHARY

DELIVERED BY LORD ATKIN

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