Bansidhar Durgadatt Vs The Tata Power Company Limited

Court: Bombay High Court

Date of Decision: Dec. 9, 1924

Citation: (1925) 27 BOMLR 330 : 87 Ind. Cas. 547

Hon'ble Judges: Norman Macleod, J; Crump, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Norman Macleod, Kt., C.J.
The plaintiff company filed this suit alleging that one Bansidhar Durgadutt (hereinafter called the first

defendant) had by two several applications, dated respectively October 3, 1919, and October 11, 1919, applied for 380 ordinary and 120

preference shares in the plaintiff company subject to the articles and memorandum of association of the company, remitting with the said

applications Rs. 13,000 and Rs. 37,000 respectively as the amounts of deposit in respect of the shares so applied for.

2. On December 1, 191P, the Board of Directors allotted to the first defendant 190 ordinary and 120 preference shares, and notices of such

allotment were sent to the first defendant. The first defendant paid the allotment moneys. A first call of Rs. 100 on each of the ordinary and

preference shares was made payable on September 1, 1921, by a resolution of the Board of Directors dated July 20, 1921, and a notice was sent

to the first defendant on August 12, 1921. The first defendant failed to pay the amount due on the first call, and notices were sent to him by the

company and their solicitors respectively demanding the said amount with interest at nine per cent.

3. After the institution of the suit the company were informed that Bansidhar Durgadutt, the registered holder of the shares, was not an individual

but a firm, and the plaint was consequently amended by adding the firm as second defendant.

4. A second call of Rs. 10(1 on the ordinary shares and preference shares payable on April 1, 1922, and a third call of '' Rs. 200 payable on

November 10, 1922, were made by resolutions of the Board on March 10, 1922, and September 27, 1922, respectively, and notices were sent

to the defendants. The defendants declined to pay the said calls and the plaint was amended so that the further claim for Rs. 93,000 and interest

might be included in the suit.

5. The total sum claimed was Rs. 1,24,000 with interest at nine per cent, from the date of the various calls on the amount due on each call.

6. In their written statement the defendants admitted that Bansidhar Durgadutt was the registered holder of the 310 shares but they pleaded that the

applications for the shares were made on the faith of certain representations made in the prospectus of the company.-

(1) That the applications would be received only up to Monday October 13, 1919.

(2) That the present issue was of Rs. 10,000 shares of 7Ã¯Â¿Â½ p. c. cumulative preference shares of Rs. 1000 each and 35,000 ordinary shares of

Rs. 1,000 each. Out of these shares, 7,000 preference and 25,000 ordinary shares were to be taken up by the directors, agents and their friends,

and the remaining 3,000 preference and 10,000 ordinary shares were for public subscription.

7. The defendants alleged the said representations were absolutely false The company accepted applications long after October 13, 1919. The

company had given to the public 5,000 preference shares instead of 3,000; and 17,000 ordinary shares instead of 10,000, the directors, agents

and their friends taking up a much smaller number of shares than stated in the prospectus.

8. The defendants submitted that they were entitled to a rescission of the contract for the purchase of the said shares.

9. The defendants, therefore, counter claimed asking (1) for a declaration that the contract for the purchase of 310 shares in the company was not

binding on the defendants; (2) that the register of shareholders might be rectified by removing the defendants" name therefrom; and (3) that the

plaintiff company might be ordered to pay to the defendants the sum of Rs. 62,000 paid to them for the said shares with interest.

10. The following issues were raised at the trial:-

1. Whether the applications for shares wore made on the faith of the , representation in the prospectus referred to in para (2) of the written

statement.

2. Whether the said representations or any of them were false ?

3. Whether the defendants are entitled to rescission of the contracts to take shares referred to in the plaint?

4. Whether the defendants are entitled to have their names removed from the register of shareholders of the company ?

5. To what sum, if any, are the plaintiffs entitled on their claim ?

6. To what sum, if any, are the defendants entitled on their counterclaim ?

11. As far as I can gather from the record the defendants had not disclosed, before the written statement was filed, on what grounds they were

objecting to pay the calls.

12. When the plaintiffs'' solicitors wrote on February 1, 1922, demanding payment of the first call, defendants'' solicitors replied on the 15th

referring Messrs. Wadia and Gandhy to their letter of February 14 written on behalf of another client, in which they merely asked for inspection of

the register of members commencing from the date of the registration of the company, and of the minutes of the directors'' meeting when it was

decided to make the call.

13. The learned Judge found as follows on issues Nos. 1 and 2:

(1) That the applications for shares were not made on the faith of the representations in the prospectus referred to in para 2 of the written

statement.

(2) That the representations were false.

14. He, therefore, passed a decree as prayed for with costs as of a short cause and dismissed the counterclaim with costs.

15. The defendants have appealed.

16. The first alleged misrepresentation in para 2 of the written statement was not relied upon at the hearing. It was admitted that applications were

received up to February 11, 1920, but it was not suggested that this representation in any way induced the defendants to make their applications

for shares.

17. The defendants complained about the second representation on two grounds.

(1) That the number of shares mentioned therein was not true.

(2) Because it gave a wrong impression as to the holding of the directors, agents and their friends.

18. The history of events prior to the flotation of the company was as follows.

19. Messrs. Tata Sons Ltd., who had already floated two companies for generating electric energy by water power, had obtained a concession

from Government for the development of a third project.

20. In July 1919, the firm issued a private and confidential circular, Exh. Y, giving an outline of the project both in its technical and financial aspects

to over 100 selected individuals whose names appear in Exh. Z. Thereafter letters were received by the firm from various persons asking for

shares to be reserved for them. Oral applications were also received, and all applications were dealt with under the orders of the partners in the

firm, principally by Mr. Billimoria. It was unfortunate, as the evidence in the case shows, that proper care was not exercised in preparing accurate

lists showing the number of such applications and the extent to which they were granted.

21. On September 18, 1919, the company was registered, and on September 25, 1919, the prospectus was issued. Application forms wore sent

to reservees which were marked with a letter and figure giving reference to the register of reservations. A circular letter, Exh. I, accompanied the

forms asking that the forms should be filled in and returned together with the necessary deposit money.

22. A p.s. to the circular was as follows:-

You are kindly requested to write your name on the top of every application form in case you have distributed amongst your friends shares out of

your holding.

23. The total number of shares allotted were :-

34,861 ordinary

8,697 preference

which were distributed as follows :-

Ordinary, to directors, agents and friends 19,818

to the public 15,043

Preference, to directors, agents and friends 5,293

to the public 3,404

24. The learned Judge was put to a very great deal of trouble to ascertain what number of shares had actually been reserved at the date of the

prospectus. The evidence relating to the reservation has been carefully set out at great length in the judgment and the conclusion arrived at was that

the figures 25,000 ordinary and 7,000 preference shown in round numbers as reserved in the prospectus were substantially accurate, and that as

to the numbers stated in the prospectus there was at the date oil the prospectus no misrepresentation. The appellants'' counsel in the course of the

argument before us did not attempt to contest that finding.

25. The next question was whether the representation that the 25,000 ordinary and 7,00:) preference shares were to be taken " up by the

directors, agents and their friends was true.

26. It was contended that the term "" friends"" includes only those persons who were directly influenced by the directors to apply for reservation of

shares. They relied on the case of Henderson v. Lacon (1867) L.R. 5 Eq. 241 but the facts in that case were peculiar and the misrepresentations in

the prospectus were so obvious that it was hardly necessary to place a restricted meaning on the w6rd "" friends"". The learned Judge was right,

therefore, in not putting any emphasis on the word "" influenced"". I agree with the following passage in the judgment:-

The word " friend " is not only a social but a business friend. A business friend who applies for shaves because, in the course of his business

dealings with the directors, ho acquired a knowledge of the project is correctly described in a prospectus as a " friend; and the influence would be

merely the fact of that business connection.

27. But the judgment proceeds :-

But the plaintiff company include in the term not merely business friends, but also the friends of these business friends, I think this further extension

is inadmissible because whether in social or commercial relations a friend"s friend is as often as not an enemy or a rival.

28. Surely, that remark would equally apply to a business friend. A person who in business had come to know of this project and applied to the

agents for a reservation of shares would be, according to the learned Judge"s definition, a friend, but in other branches of business he might be a

rival. I would prefer not to use the word enemy. Then the learned Judge says:-

It is true that a friend who receives a reservation might apply for his friends as their nominee. If that had been all there would perhaps be no

misrepresentation. But the company wont much further. Exhibit (1). They invited reservees to distribute shares to their friends. They reserved

shares not only for individuals, but for the business circle which these individuals represented. They deliberately sot up centres for private

subscription and then described the shares so set apart for private subscription as reserved for their "friends.

29. Now there does not seem to be much difference to my mind between the promoters of a company saying to A, ""At your request we will

reserve for you so many shares. We know you can dispose of them amongst your friends if you want to after allotment"" and their saying to him,

Here are the application forms for the shares reserved for you. You have already told us you do not want to hold them all yourself. So you can get

your nominees to fill in the application forms, but put your name on the top so that we can trace the application to the particular reservation in your

favour"" The only practical difference would be that the reservees would not have to pay the application money and he would be saved the trouble

of transferring the shares after allotment.

30. In other words, would it be misrepresentation if the promoters guaranteed that so many shares were to be taken up by their friends, when they

knew perfectly well that those friends intended to make what they could of the favour shown to them by the reservation I doubt it very much.

Promoters may guarantee that shares will be taken up or have been taken up by reservees, but they cannot guarantee that the shares will be held

by them. Failure to disclose material facts would amount to misrepresentation, but the fact that a holder of shares can sell them is common

knowledge.

31. I will deal with a typical example out of those which have been relied on by the learned Judge to support his conclusion. 675 shares were

reserved for Ambalal Sarabhai. The plaintiffs knew that he did not want them all for himself, as Mr. Bhabha deposed that the plaintiffs expected a

large list of friends of his from Ahmedabad. The fact remained that Ambalal was a reservees for 675 shares. If he had introduced his friends to the

promoters and the promoters had accepted them as reservees, nothing could have been said. As he did not do so, the plaintiffs were entitled to

represent him as the friend by whom the shares were to be taken up. It has thus been proved that the promoters had reserved substantially the

number of shares given in the prospectus, and I am prepared to say that it was substantially correct to state that they were reserved for friends of

the directors and agents.

32. Assuming, however, that the representation was untrue, as the learned Judge has found, the next question is whether the defendants were

induced by the misrepresentation to take up the shares, fur, in order to succeed in an action for deceit, the plaintiff must prove that he was actually

deceived by the misrepresentation complained of: Smith v. Chaduick (1882) 20 Ch. D. 27. I do not think that there is any doubt that it must be

inferred from the evidence that Baijnath Bansidhar, the partner in the defendants firm who made the application, had read the prospectus, even if

the whole of his story cannot be believed. The prospectus appeared in The Bombay Chronicle of September 27, Exh. 22 " which would be

available in Calcutta on the 29th, Besides the application forma sent in by the defendants would be annexed to copies of the prospectus. Then if

Baijnath after reading the prospectus applied for shares, it is for the plaintiffs to rebut the inference that the application was based on the

representations made in the prospectus. In smith v. Ghadwich, Jessel M. R. said:-""Unless it is shown in one way or another that the applicant did

not rely on the statement the inference follows."" In his evidence Baijnath said :-

I can read English. I read the advertisement, I discussed with Ramcoover if shares should be taken. I thought that should purchase the shares as

only a small number wore left for the public. I made an application on October 3. 1 got the forms in the shop of Dwarkadas itself. The form was

attached to the prospectus...in January 1922 I learnt in Calcutta...there was some upset in the company. So I came to Bombay to make enquiries.

I instructed my attorneys to write the letter of February 15, I applied for shares as the prospectus stated that directors, friends and agents had

taken up 25,000 ordinary and 7,000 preference. I thought from that that it must be a profitable Concern . I applied as there was only a small

number left for the public.

33. In cross-examination he said :-

From the first part (sic) I. understood that the directors, agents, and friends had taken up 25,000 and 7,000 shares, I would not have applied if I

had understood that they were only ready and willing to take up that number.

34. This last answer really disposes of the defendants'' case. The shares were applied for on a misreading of the prospectus and not on the faith of

the representation which was actually made.

35. The learned Judge, however, has come to the conclusion that the defendants were not induced to apply for the shares by what was

represented in the prospectus on another ground which it is more difficult to justify. It is practically impossible to ascertain what is passing in the

mind of a man who after reading the prospectus of a company applies for shares. Apart from his misreading the terms of the prospectus, Baijnath''s

story as to how he came to apply for the shares would be the natural story of any applicant who had read the prospectus. The fact that the

promoters gave out the amount of support they had received in advance for the Flotation of the company would inevitably weigh on the minds of

the public, and would influence them when sending in applications for shares. There might also be other considerations, and the learned Judge

appears to think that those afforded the real reason for Baijnath''s deciding to send in his applications. Undoubtedly in the middle of 1919, when

money was plentiful, the public were ready to subscribe to any company promoted by persons of repute. In August 1919, the defendants must

have heard of the impending flotation of the plaintiff company because they sent a cheque for Rs. 2,500 and asked that twenty-five shares should

be reserved for them. They were anxious to get shares then'' before the prospectus was issued to the public, and when they were told that the

promotors did not want their money and that they should apply after the prospectus was issued, they must have realised that the promoters at that

time were not prepared to deal with any chance stranger who might apply for a reservation. Even though they asked in October for a far larger

number of shares it is not an unfair inference that they made the application because they thought it would be a profitable investment. If they had

sent in their application for 500 shares because of the limited number of shares offered to the public, desiring and expecting to be allotted only a

proportion of what they had asked for, although as a matter of fact Baijnath did not say anything to this effect, they would have no reason to

complain as they were only allotted 310 shares, and the suggestion made in the written statement, that, because some of the shares reserved were

allotted to the public to the disappointment of some of the reservees, there was a misrepresentation, has no substance in it. In facts it counts against

the defendants. In the case of another company floated by the same agents a few months before the plaintiff company"s project was entertained,

there were loud complaints from the public that too many shares wore reserved for the promoters and their friends, and so the directors of the

plaintiff company were anxious to increase the number of shares available for the public to satisfy the demand. If when the business of allotment

was going on, the plaintiff company had told the defendants, "" We are reducing the shares reserved for our friends and increasing the shares

available for the public, and you may think that a ground for rescinding your contract so that we will take back your shares,"" the defendants would

only have felt more inclined to hold to what they had got.

36. I think, therefore, that the true position when the prospectus was issued was this, The defendants were told that only 10,000 ordinary shares

out of 35,000 were available for the public and so at the highest they may have applied for more shares than they wanted. The real inducement to

invest in the company was because money awaiting investments was plentiful, the general reputation of the promoters with the public was excellent,

and consequently defendants thought they were getting a favourable opportunity for investing their money When the partly paid shares could not be

disposed of at a premium, when large amounts for calls became due, and money was much scarcer, they bethought themselves what was the best

way of evading their liability.

37. We think the judgment appealed against was right and the appeal is dismissed with costs.

Crump, J.

38. I entirely agree.