

(1959) 10 MAD CK 0017

In the Madras High Court

Case No : Appeal No. 471 of 1955

Nellie Wapshare and Others

APPELLANT

Vs

Pierce Leslie and Co. Ltd. and Others

RESPONDENT

Date of Decision : 14-10-1959

Acts Referred:

Companies Act, 1956 — Section 243(1)
Evidence Act, 1872 — Section 111

Citation : AIR 1960 Mad 410 : (1960) ILR (Mad) 407 : (1960) 2 MLJ 401

Hon'ble Judges : Ramaswami, J;Anantanarayanan, J

Bench : Division Bench

Judgement

Anantanarayanan, J.

(1) This is an appeal by the plaintiffs in the Court below representing the entire body of shareholders of a private limited company, the O. V.

Estates Ltd. (16th defendant) which was liquidated, for possession, vesting or reconveyance of the suit properties (Schedules A to D) alleged to

have been transferred through the exercise of fraud, misrepresentation and undue influence on the part of defendant 1 (Messrs. Pierce Leslie &

Co. Ltd.), and defendants 2 to 14 through the 1st defendant, who stood to the plaintiffs in a fiduciary relationship of trust and confidence, in favour

of the O. V. Estates (1939) Ltd., the 15th defendant (new company). The learned Subordinate Judge of Nilgiris dismissed this suit upon findings

adverse to the plaintiffs upon all the main issues, including limitation.

(2) In the presentation of this appeal before us learned counsel for the appellants has attempted to base their case upon certain principles of equity

jurisprudence, which have received both statutory recognition and the affirmation of Courts in many precedents, within the ambit of the specific

case of actual fraud, willful misrepresentation and the deliberate exercise of undue influence, which were not proved, and which have now been

abandoned. But this is in no sense the superimposition of a new case; it is not any other frame of suit upon the facts and probabilities of the record.

It is the consideration of those facts and probabilities in a somewhat different complexion, because the plaintiffs (appellants) claim to be entitled to

succeed, in the light of certain principles of law repeatedly applied by courts, particularly courts exercising a jurisdiction in equity, conceding that

they had failed in proof in certain areas of their claim. The tenability of this, in the wide sense is not disputed by learned counsel for the first

defendant (Messrs. Pierce Leslie & Co. Ltd.) or the 15th defendant, which may be hereinafter termed "The new Company", as distinguished from

the "Old company" (the 16th defendant), who are the main contesting respondents in appeal.

(3) The case of the appellants may be further clarified as follows: The plaintiffs, who were all members of a single British family, the Wapshares,

conducting planting operations in an estate in the Nilgiris, formed the exclusive body of shareholders of a private limited company founded by the

later J. H. Wapshare. The 1st defendant company were the secretaries, under the directors of this old company 4. In the context of increasing

pressure from the Imperial Bank of India, who were the financiers and debenture trustees under a debenture trust deed (Ex. A. 18) which created

an English mortgage in their favour over the properties, to sell the estates and liquidate the indebtedness under threat of foreclosure and actual entry

upon the properties, the plaintiffs (appellants) entered into the impugned transactions, and consented to the liquidation of the old company.

They were persuaded to this course by the 1st defendant company, which stood to them in a fiduciary relationship of trust and active confidence.

In these transactions, they were in terrorem as far as the threats of the Bank to foreclose and to enter upon the properties were concerned, and

further an actual date-line (the 15th November, 1937) had been fixed by Bank. They had no independent legal advice; in fact, they had no

disinterested advice of any kind. Though the transactions were in form with the new company, the 15th defendant, it was really the 1st defendant

and two or three of the directors of the old company (16th defendant) itself, who were the promoters of the vendee company, responsible for its

flotation. Quite apart from any actual fraud, willful misrepresentation, or undue influence, the transactions are impeachable upon the principle of

what is known as "Constructive Fraud." There is also a heavy burden on the 1st defendant company and the ex-directors of the old company, who

associated themselves with the formation of the new company, to clear themselves in respect of these transactions; a burden which has received

statutory recognition in this country in S. 111 of the Indian Evidence Act.

That burden has not been discharged in this case. Further, the facts abundantly establish that, in the context of another offer for 14 lakhs for the

entire estate including Naduvattam, the offer which appellants were induced to accept was less than a fair price to the extent of about 12 lakhs;

there was certainly "unjust enrichment" to this degree, of the 1st defendant company and certain ex-directors of the old company. This they must

now disgorge; in this respect they must make restitution.

Every difficulty of formal rigour, whether arising from the non-identity of the appellants with legal persona of the old company, or their incapacity to

represent it after its liquidation, or the non-identity of the 1st defendant company with the new company (15th defendant) in the outer semblance of

the transactions, must be resolved in favour of the appellants. For the Courts' power to "pierce the veil" of corporate personality in such cases, in

order to administer equity and to render justice, is large and indisputable.

The bar of limitation is accepted as an absolute bar, if it exists; for though there is authority for the view that the Statute of Limitation must be

beneficently construed in favour of him who seeks to sue, nevertheless, the interpretation of it must be strict, for equitable grounds cannot be

imported into that task. But it is submitted that the suit as framed for recovery of possession of the corpus of the estate was not barred, and that

the suit is in time.

(4) We have set forth these contentions at a little length, even before proceeding into the history and facts of the case, because the case presented

in appeal, though within the ambit of the same record of facts and probabilities, attempts the application of somewhat different legal concepts to

those facts. It is only proper that the contentions per contra, particularly as advanced by learned counsel for 1st defendant company before us,

should be tersely indicated.

(5) Firstly, the alleged fiduciary capacity is denied. It is not true that there was any position of trust and active confidence between the plaintiffs

(share-holders) and the 1st defendant company who were strictly secretaries with limited functions and powers, working under the orders of the

directors of the old company. Nor were they "agents for sale" in respect of the attempted sale of the estate; even here, they were purely carrying

out secretarial functions of advertisements, communication of offers to the Board of Directors, etc. Actually, there could be no jural relationship

between the plaintiffs (shareholders) and the secretaries, for there is an amplitude of authority on the proposition that the shareholders of a

company are quite distinct from the legal persona of the Corporation.

With regard to the ex-directors of the old company, of course, it seems impossible to deny that they were at least quasi trustees, if not trustees

proper, in respect of the share-holders. But this is academic for defendants 2 to 14 have virtually gone out of the suit. They are not sought to be

made personally liable, three of them are dead, and the legal representatives have not been brought on record.

(6) Even if a fiduciary capacity could be spelt out of the facts, it is not the law that every transaction between the trustee and the cestui que trust is

inhibited. Where there is an open disclosure of facts by both sides, where the cestui que trust is voluntarily entering into the transaction upon an

equality of footing and at arm's length, the mere existence of a fiduciary relationship will suffice to impugn a transfer, or to have it set aside. The

Wapshares, particularly Miss Dorothy Wapshare (3rd Plaintiff), were capable, knowledgeable, and not in the least likely to be deflected in the

exercise of an independent judgment by whatever Mr. Thorne (3rd defendant), who admittedly acted on behalf of 1st defendant company in these

matters, could have said. Above all, the price paid was fair and adequate; there was no "unjust enrichment" whatever. This is indeed the crux of

the matter, and here Mr. Nambiar for the 1st defendant company has been at great pains to attempt to convince us, upon a minute analysis of data,

that an adequate and fair price was paid for the estate taken over.

(7) It is strenuously contended that appellants cannot maintain this suit, in any manner known to law. A company is distinct from its shareholders;

they have no rights in the properties of the company, or in respect of the

remedies it could enforce against its wrongdoers. It is conceded that the latter proposition is indeed, not unqualified. For, even during the life of a corporation, authorities have held that a minority of the shareholders could sue where a tyrannical majority bars redress, where the corporation acts ultra vires of its powers, where it perpetrates fraud, etc. But the present is not such a case. By the voluntary liquidation, the legal personality of the old company came to an end. The company could have been revived or restored to legal personality within two years of its dissolution under S. 243(1) of the Companies Act.

That was not done, and that makes an end of any remedy open to the erstwhile shareholders (the plaintiffs), even against a "fraudulent" trustee in possession of assets. The doctrine of "piercing the veil" of corporate personality cannot be invoked here. Nor can the learned counsel for the appellants seek the intervention of this court upon such a general doctrine as ubi jus ibi remedium: though Holt C. J., might have said in *Ashby v.*

White 1 S. L. C. 253 that it was "'vain thing to imagine a right without a remedy,'" this cannot be invoked to clothe plaintiffs with a capacity to sue that they do not possess.

(8) It is submitted that the bar of limitation is equally operative. As the suit was framed, and upon the wording of the reliefs in the plaint, it is at least difficult to contend that this was a suit for recovery of a possessor interest under Art. 144; or a suit based upon dispossession and discontinuance, under Art. 142. But assuming that Art. 144 did apply, and that parties understood the suit as so framed, plaintiffs, could not sustain this action, they not being owners of property, seeking to recover possession from a person holding the estate adversely to them. Of the other articles, such as Articles 91-95 and 120, Article 120 is the most applicable, being the residuary article for such actions in equity; but if the article is to be applied, the period of limitation is only 6 years, and the suit is time barred.

(9) Mr. Nambiar also submits that appellants were undeniably guilty of laches, and "lying by," if not of actual acquiescence. They cannot wait till the estate became far more valuable by accretions, by changes in the climate of industry, by investment and developments by the new company, and then seek to recover the corpus, or to obtain its reconveyance. Authorities have proceeded so far as to state that mere laches could disentitle a

party to any relief; though he concedes that the authorities do not speak with one voice on this subject.

The actual excuse put forward by the plaintiffs, that it was only after they perused the "Madras Mail" article dated 3-9-1948 (Ex. A. 216), that

they awoke to a realisation of their true rights, and then consulted Dr. C. P. Ramaswami Aiyar, which led them to institute this suit, is purrile and

inadequate. Accounting for laches cannot merely relate to some mental state of exceptional ignorance; particularly where, its work of investment

and development, naturally assuming that the failure on the part of the appellants to advance any claim is acquiescence.

(10) It is now time to proceed into the facts and history of the matter. In view of the intricate and interesting questions involved, we have done so in

some detail, particularly with regard to the area and context of the impugned transactions. But the documentation in this suit is heavy (three volumes

of printed papers), and we have contended ourselves with indicating the broader landmarks of documentation, so that the narration of events need

not be impeded. Similarly, in the discussion of legal principles as applying to the facts, we have made a judicious selection from the extensive case

law (English, American and Indian) and passages from classic treatises of law, which the research of learned counsel has made available to us.

(11) A certain James Ouchterlony acquired certain estates in the Nilgiris in 1845. After his death, the estate passed by succession to James Henry

Wapshare, the husband of 1st plaintiff and father of plaintiffs 2 to 5. The Imperial Bank of India were financing Mr. Wapshare, in the running of the

plantation consisting of tea, coffee, etc. In 1927, Mr. J. H. Wapshare formed a private company with a capital of 15 lakhs, O. V. Estates Ltd. or

the "old company" and conveyed the properties to it (Ex. A. 17). The shareholders of this small private company were the members of the family.

In May 1927, debentures to the tune of 101/2 lakhs were issued to the Imperial Bank under the Debenture Trust Deed, Ex. A. 18. It is

indisputable that this was an English mortgage with virtual powers of the debenture trustees to foreclose in case of default of repayment of debt, to

enter upon the properties, and to sell or to manage the plantation. Mr. H. N. Small on behalf of the Imperial Bank represented the debenture

trustees on the Board of Directors, and the evidence shows that he played no inconsiderable part in the subsequent history of the estate, up to the

time of the impugned sales.

He was exercising authority, in the sense of exerting pressure upon the Wapshares and the Board of Directors to have the estates sold and making

it clear that the Bank would enter upon the properties in case of failure to wipe off the debt. The only difference suggested is that whereas to the

Wapshares this threat was very real, a part of the record suggests that the Directors at least were aware that mere entry would solve no problem,

that the Imperial Bank of India were ill-fitted to be tea or coffee planters, and that even the Bank must here rely on the services of an expert

agency like 1st defendant. Also, perhaps, the directors if not the Wapshares, were aware that, even in the case of an English mortgage the right of

the mortgagee to virtually step into the proprietorship might not be such an unqualified right in law.

(12) In 1931, the South India Plantation Agency were appointed as Managing Agents of the estates for 5 years. (Ex. B. 54) From about 1931,

attempts were being made to pay off the debenture debt by sale of the properties, in the context of increasing losses. In 1931, Messrs. Congreve

and Grieg, expert valuers, valued the estates at 23 lacs, and opined that after some years of careful working, the value would appreciably increase

(Exs. A. 19, A. 21).

Again, in 1935, Pittock (defendant 2) was appointed visiting Agent, and he filed a report which showed that the prospects of the estate were fair,

with good management. In May, 1935, the Bank wanted a stronger Directorate, and Wapshare and his wife resigned and outsiders came in. On

2-10-1935, Messrs. Pierce Leslie (defendant 1) took over as secretaries from the Managing Agents. We shall refer later to their functions, and to

the terms of their powers and duties under the relevant document, Ex. A. 5. We must here note that S. I. P. A. resigned their Agency under Ex. A.

36 D/- 2-4-1935 as ""existing conditions were unsatisfactory.

(13) The Directors' Report of 9-12-1935 (Ex B. 1) showed a loss of Rs. 80,185-11-2-. After a year's management by the new Directorate and

secretaries, the Directors' Report showed a loss of Rs. 10,865-9-5. In 1937, Mr. Small began to be interested in pressing ""three courses"" on the

Wapshares to liquidate the indebtedness (Ex. A. 46) and we first hear of Messrs. Arbuthnot Latham being asked to make an offer for the estates

(Ex. B. 92).

On 18-3-1937 the 1st defendant wrote to the directors offering to purchase the estates for the 1st defendant company themselves, with a six

months' option (Ex. B. 3). This was for 101/2 lakhs excluding Naduvattam, the estates, to be taken over as from 30-4-37, and one of the terms

being that 1st defendant company should have a right to use the name of the old company (O. V. Company) for the new company. This implies

that the germ of the idea was already floating in the minds of those in charge of 1st defendant company, that the estates should be taken over, and

a new company promoted by them to run the estates in which they (1st defendant company) will have a predominant share and interest. We would

stress that there was nothing dishonorable about this, nothing unethical as far as industrial practice is concerned. But, from the point of view of a

person in a fiduciary capacity, the conflict between interest and duty is already apparent, as well as the necessity for vigilance and the utmost good

faith.

(14) From a reply of Mr. Wapshare to Mr. Small dated 25-3-1937 (Ex. A. 48) it is clear that Mr. Wapshare thought that he could sell part of the

Estate for the indebtedness to the bank, and still realise a small surplus of about 11/2 lacs, and retain Naduvattam which had the family house and

some waste lands. From this date 25-3-1937 to 15-4-1937 (Ex. B. 4), when Mr. Small gave notice to 1st defendant that the debenture holders

would enter and take possession of 15th May if there was default, we are concerned with several steps for a shareholders' meeting, under

pressure from the Bank.

At this stage three offers for the estate emerge, one from Messrs, A. V. Thomas (14 lacs), one from Kuruvilla Brothers, and one from Messrs.

Arbuthnot Latham. The Wapshares decide to close with the offer of Kuruvilla Brothers, and a period of hectic activity follows, during which the

Wapshares seem buoyed up by the confidence that they would redeem the debt finally and still save the estates in part. But all this was temporarily

held up by the death of Mr. Wapshare on 18-5-1937, which constitutes our next landmark.

(15) The documents Exs. A-85, A-207, B. 7, B. 427, N. 428, B. 8, B. 9, B. 433 and A. 103 unfold the history of the Kuruvilla deal, which

unfortunately aborted in spite of Miss Dorothy Wapshares a hopes and efforts, when the intending vendees failed to make the 1 lac deposit

required. Perhaps, Mr. Small thought that inexperience in judging offers had led to a fiasco, for he warns Miss. D. Wapshare (Ex. A. 105) that she

must not deal directly with the parties, but only through defendant 1 and the Directors.

At this stage, the Bombay-Burmah Trading Corporation enter the scene as probable vendees. As we shall see later, though there are several such

offers, the situation finally crystallises into two offers, one of which the Wapshares must necessarily accept if the debenture-trustees were not to take

over the offer of 1st defendant company which would save Naduvattam for the Wapshares, which they were most anxious to retain for sentimental

reasons, because it contained a family-house and because it gave the Wapshares the self-respect of a continued existence as planters, and the offer

of Messrs. A. Lathem for 14 lacs, including of Naduvattam estate.

(16) Ex. B. 10 dated 31-7-1937 (report of a shareholders' meeting) is of some significance. Here for the first time, Messrs. P. L. and Co.

(defendant 1) stated that "'as it was possible that potential buyers might not like to make firm offers for the estates through them (as possible

competitors) they would prefer all final offers to go direct to the Chairman.

It is the first expression of a consciousness of embarrassment, of a possible conflict between, interest and duty, of a glimmer of awareness of a

person in a fiduciary capacity, that he must proceed with care, search his breast and clear himself, before he procures in advantage; unfortunately,

it is also the last. Ex B. 431 dated 11-8-1937 is important as the expression of the determination of the debenture trustees (Mr. Small) to definitely

enter and take possession after the date-line: 15th November. The Oriental Life Assurance Company also seem to have been approached at this

juncture (Ex. B. 131), by they were unable to advance the needed moneys.

(17) Though the Wapshares were most anxious to retain Naduvattam estate with its Bungalow (the evidence also shows that it has the highest

altitude for tea, and was the pick of the estates), Mr. Small seems to have been concerned that this should not succeed, if it implied that sales might

be stayed off by such parceling of the estate, to the loss of the debenture-trustee interests (Exs. B. 18 and B. 22).

On 25-10-1937, we find 1st defendant making an offer to Mr. Simcock among the directors, wanting Naduvattam, but giving other concessions to

the Wapshares (Ex. B. 23). In November, the possibility of the Bombay-Burmah Trading Corporation helping to save the estate by redeeming the

debts, "petered out;" they wanted the estates only at rock-bottom prices (Ex. B. 29).

On 2-11-1937, 1st defendant agreed to make a deposit of Rupees one lac in pursuance of their offer (Ex. B. 30). The original "firm" offer of

defendant 1 (Ex. B. 23) was for the price of 111/2 lacs of rupees, including Naduvattam. The offer, as modified by the interview between Miss

Dorothy Wapshare and Mr. Thorne (representing the 1st defendant) at Calicut on 6-11-1937, was for the properties excluding Naduvattam at Rs.

10 lakhs, and 1st defendant to lend plaintiffs 1/2 lakh of rupees to enable them to pay off the Bank, on hypothecation of the tea-bushes or crop at

Naduvattam estate in their favour.

The final agreement, Ex. B. 45, was to the effect that the old (O. V. Estates Ltd.) Company agreed to sell the entire estate including Naduvattam

to defendant 1 for 101/2 lakhs but that defendant 1 company also agreed under Ex. B. 347 to sell Naduvattam for Rs. 50,000/- to Mrs.

Wapshare, an agreement which was ultimately implemented by the sale deed, Ex. A. 202. In brief, the result was the sale of the entire estate

excluding Naduvattam to 1st defendant company for 10 lakhs; if we exclude the Mamally Coffee Curing Works valued at Rs. 75,000/- but

retained by 1st defendant the actual price was Rs. 9,25,000/-.

(18) On 4-11-1937, Mrs. Wapshare was at Bangalore, ill and bed-ridden at St. Martha's Hospital, Dorothy Wapshare was at Madras, visited

Mr. Small, and heard from him of the offer of Messrs. A. Lathem (A. L.) of 14 lacs for the entire estate. Mrs. Wapshare sent a telegram to 1st

defendant company that A. L. were offering 14 lakhs and asking them if 1st defendant company could do better. (Ex. B. 152).

1st defendant company replied that they ""cannot increase,"" and rejected the idea of an interview mooted by Mrs. Wapshare. Further telegrams

between the parties led to the understanding of an interview at Calicut with Mr. Thorne (Wapshare wired that she was coming by car from Madras

on the 6th. The final interview at Calicut was on the 6th November between

Dorothy and Rovert Wapshare on the one hand, and Mr. Thorne on the other. It resulted in the deal between the Wapshares (shareholders of the old company) and 1st defendant, the particulars of which we have already set forth, subject, of course, to further confirmation of Mr. Thorne's principals at London, and a decision by the O. V. Company per se.

The evidence of what actually occurred, consists of the oral testimonies of Gorden Wapshare (4th plaintiff), Dorothy Wapshare (3rd plaintiff), Mr.

C. Thorne (3rd defendant) and Mr. Thorne's contemporaneous memorandum (Ex. B. 448).

But two things are crystal-clear about this aspect of the case. Firstly, the Wapshares had no disinterested advice, and no legal advice. On the 8th

November, Mrs. Wapshare wanted her daughter to have legal opinion (Ex. A. 115), but the opinion of Messrs. Gonzalves, which was significantly

enough, unfavourable (Ex. A. 123), was obtained after the Wapshares had committed themselves, and just prior to the shareholders' meeting. The

utmost that Mr. Nambiar for 1st defendant company is able to suggest is that there was nothing actually to prevent the Wapshares from obtaining

such advice.

Secondly, Mr. Thorne was in a position to dominate and lay down his terms, because of certain vital considerations. The unpleasant background,

which could not be exorcised, was the relentless pressure of Mr. Small on behalf of the debenture trustees, the threat to enter by the 15th

November. The Wapshares had either to sell on the best terms they could get, or to be dispossessed of everything, including the family house.

Their anxiety to save Naduvattam was partly because the family-house was in this estate, because of sentiment, because this at least enabled them

to retain the self-respect of an active, planting family. Given this anxiety, their choice of Mr. Thorne's offer, greatly to their detriment in comparison

with A. L.'s offer of 14 lakhs, was perfectly explicable. Seeing a golden opportunity for the enrichment of his principals, for certainly Naduvattam

estate was worth about 11/2 or 2 lakhs and no more, and, in the context of A. L.'s offer, 1st defendant company was virtually acquiring the rest of

the estate worth about 12 lakhs for 10 lakhs, Mr. Thorne played his cards skilfully and well.

He gave no indication whatever of hurry or pressure, and left the Wapshares

alone for fifteen minutes or so, for consideration. He even conceded that A. L.'s offer was financially more advantageous. Mr. Nambiar has shown us that even later than this interview at Calicut, before matters were finally clinched, Mr. Thorne wrote to the Wapshares indicating a locus penitential, if they desired to change their minds about the sales to 1st defendant company. But he knew that they could not act otherwise, consistent with their desire to alive in India, with a home for themselves and a plantation.

His memorandum, Ex. B. 448, shows his keenness to push the deal through, if necessary by not informing the directors of the old company like

Mr. Simcock, who were adverse; actually 1st defendant company kept them out of this knowledge, at least temporarily. Miss Dorothy Wapshare

says that Mr. Thorne put matters ""in such a way"" that they were persuaded to agree; "third defendant convinced us that it was a good offer." Mr.

Simcock says that 1st defendant company did not communicate to the directors ""the replies received from the various concerns"" to the

advertisement and approaches for offers. He says--""I feel that in courtesy, the directors should have been informed of the settlement beforehand

and I do not know why it should be done behind our backs..... Too much hole in the corner business i.e., it was too much under the counter.

Perhaps this is a little forthright and blunt; but the significance is clear.

(19) We must not be understood as implying that Mr. Thorne did not act honorably, according to his lights. We do not imply that 1st defendant

company was guilty of any intentional fraud, willful misrepresentation or undue influence. But Mr. Thorne, as an astute businessman, was putting

through a transaction greatly to the benefit of his principals; if there was enrichment, it was all to the good. He maintained every semblance and

indication of a bridge for retreat available to the Wapshares. But knowing their situation and sentiments, he was, probably, fairly certain of the

outcome. Had the parties truly been upon on equality of footing and at arms' length, nothing of this could be challenged.

It is precisely the fiduciary relation in which the 1st defendant company undoubtedly stood to the Wapshares, precisely the conflict of interest and

duty, precisely the context of the cestui que trust and trustee, in essence here though not in legal form, that makes a world of difference. How can

we be certain that Mr. Thorne did not play upon the sentiments of the relatively inexperienced Miss Dorothy Wapshare, however clever and

energetic she might have been, and young Mr. Robert, whose forte seems to have admittedly lain in the direction of shooting tigers, rather than of

comprehending business realities?

It is for this reason that the law tells the fiduciary, the trustee, especially where there is a definite enrichment, a sale definitely below true value-

convince the court that there was no enrichment, that there was disinterested advice for the cestui que trust, that the transaction could and must be

ethically sustained; otherwise, it is "Constructive Fraud," however free of a guilty mind you might have been and you must make restitution.

(20) The further facts are very little in dispute. We have the proceedings of the shareholders' meeting (Ex. B. 41), the proceedings of the

Directors' meeting (Ex. B. 43), culminating in the agreement of sale between defendant 1 and the old company-16th defendant (Ex. B-45). In

February, 1938, Mr. Murcutt was suggested as the liquidator for the old company proceeding into voluntary liquidation-Ex. B-240. Ex. B-349

dated 26-3-1938 is of some significance; it is an agreement between 1st defendant company and one Nataraja Iyer on behalf of the new company

(in formation).

It is only one further piece of evidence in proof of what was clear from the very time that 1st defendant company made an offer with an "option"

for purchase of the O. V. estates, viz., that 1st defendant company did intend to promote or float a new company to manage the estates after

acquiring them, with the goodwill of the name and style "Ouchterlony Valley Estates," and that they were keen on the specific permission of the old

company for this, as one of the terms of sale. Naturally enough, 1st defendant decided to have the predominant share and interest in the new

concern, at least at the stages of promotion and floatation.

The documents (Ex. A-7 and its original, etc.) clearly show that, at inception, the new company was practically the alias of 1st defendant company

and certain of the ex-directors of the old company like Mr. Simcock. Mr. Nambiar submits that the sale was direct by the old company to the new

company for the consideration of Rupees 9,25,000/- (Ex. A-1, excluding the Coffee Curing Works); so that, defendant 1 gained no advantage by

the transaction; for this sale by the liquidator to the new company was for the same price as that agreed to between the 1st defendant and the old company.

But these are the forms, and to be misled by the outer forms is to mistake semblance for reality. What really happened was, and this is not in

dispute, the consideration of Rs. 9,25,000/- was paid to defendant 1 by the new company (15th defendant) by issuing to 1st defendant Co.

1,62,500 shares with a face value of Rs. 2/- each, making a total of Rs. 3,25,000/-, the balance price to be paid by the new company to the 1st

defendant in the form of debenture stock to the value of 6 lakhs. What is the result of these transactions? The fiduciary (1st defendant company)

gained a benefit or enrichment, out of the transaction, at the expense of the cestui que trust or the person who was reposing the confidence, to the

extent of nearly 2 lakhs.

But this was not in the form of corpus which passed directly to the trustee guilty of the "constructive fraud." The corpus was taken over by a

newly-floated company, in which the "fraudulent" trustee (we are using the adjective purely in its juristic sense, without any connotation of moral

blame) retained the benefit in the form of money-value or shares, or share and debenture stock capital. It would indeed be a pitiable matter, if

courts cannot pierce to the reality behind such transactions of an outwardly different semblance, and to render justice. But, fortunately, their power

to do so is unquestionable, in the light of the modern authorities, discussed by us later.

(21) An argument is submitted on behalf of the 15th defendant, new company, that it is a separate legal entity, and is innocent of blame. It has

grown and developed considerably since its inception, and now comprises a multitude of shareholders, who have no concern at all with the history

of the "constructive fraud" which related to the birth of this corporation. Its assets have been developed by investment and nurture and the plaintiffs

who have admittedly been guilty of laches and "lying by," cannot be permitted to recover possession of any part of these assets, or to obtain a

reconveyance of any item of the corpus.

To do so would not be just and fair to the new company, as a legal person. These arguments have considerable force. The effect of them is that we

are invited to "pierce the veil" of the corporation, to reach the present interest of those share-holders like defendant 1 who have ownership in the

share-capital today, who alone have been guilty of "Constructive Fraud," and are liable to this extent. These arguments commend themselves to us,

and we shall be mindful of them in ultimately awarding reliefs to plaintiffs (appellants), if we find that appellants are entitled to succeed.

(22) Before leaving this part of the appeal, where we are mainly concerned with the questions of fact, there is one question that we must deal with

a little more specifically, though we have already indicated the available data on this aspect. This is the crucial question, whether the agreement of

sale between 1st defendant company and plaintiffs, representing the old company, in virtual essence, which was after all what ripened into the sales

by the liquidator to the new company, etc., was an undue or unjust enrichment of 1st defendant company, and if so, to what degree or extent.

Mr. Nambiar for 1st defendant company draws our attention to numerous references in the record to Naduvattam as the "pick" of the estates, the

prize bit which would most attract the intending purchase of the O. V. Estates. Its altitude was the highest, the tea-crop was the best there, and

Mr. Small was anxious not to exclude it, as this might adversely affect prospects of sales.

We have also been taken through several reports, and several accounts and balance sheets, in order to show that Naduvattam estate was making

profits, while the aggregate figures exhibit a loss over the entire O. V. Estate. But, for two reasons, not much reliance can be placed on this. Firstly,

the overall figures themselves indicate jerky changes; it was the international economic situation with regard to tea and coffee, the "slump" and the

trend of recovery, which were the major causative factors. Secondly, we find that the separate allocation of profit or loss in respect of a particular

estate could only be made, in a very imperfect manner; in fact, such an analysis cannot be relied upon.

(23) But the crux of the matter is, the true value of Naduvattam estate at the time of the agreement, and of the rest of the O. V. Estate. From every

aspect of data on record, including estimates contemporaneously made by the Wapshares themselves, the value of Naduvattam would appear to

be 11/2 to 2 lakhs. A. L.'s offer of 14 lakhs for the whole estate was a "firm" one: obviously, the rest of the estate had also great potential value,

and could be "worked up" to yield substantial profits.

This is the uniform result of the reports, commencing with those of Messrs. Congreve and Greig. We have arrived at the irresistible inference that the

rest of the O. V. Estates must have been worth about 12 lakhs. But then, how was Mr. Thorne able to persuade the Wapshares to part with it for

10 lakhs, for that is what the transactions amount to? The Wapshares were no fools, and Dorothy was at least shrewd and intelligent as a business

woman, though perhaps hardly the equal of Mr. Thorne.

Mr. Small found her intelligent and determined, and on some occasions she was even too much for him. But the Wapshares were in terrore of the

Bank's foreclosure and entry; psychologically, they clung to Naduvattam as a home and the focus of their lives. They reposed confidence in 1st

defendant company and Mr. Thorpe; no grounds to distrust their avowal here. We have no doubt that the 10 lakh offer was made to seem better,

against this background of feeling and forces.

Mr. Nambiar proceeds to the length of arguing that sentiment must also be notionally evaluated. That may perhaps be as between unrelated

parties. They are upon an equal footing and parties' length, and sentimental preference is free to express itself at any figure. The point is not that

Wapshares were not free, but that the delicate situation and their complex feelings could well have been worked upon, and probably were. Had

1st defendant company in effect paid Rs. 12 lakhs for the estate acquired through the negotiations, in favour of the new company, it would have

been a just, reasonable and fair price. It is impossible to bridge the difference, or to explain it away, except upon a basis of the "unjust enrichment"

of the trustee.

(24) We shall now turn to the authorities and text-books cited, illustrating the legal principles, and to the contexts of facts to which they have been

applied. As these are mixed questions of fact and law, we shall formulate them as issues, as follows:

(1) What are the principles of "Constructive Fraud" and "Undue Enrichment?"

(2) What are the principles of "Fiduciary Relationship? Did a "fiduciary relationship" exist between the first defendant company and the plaintiffs in

this case? As the plaintiffs were distinct from the Corporation (old company), could such a relationship arise? Are the directors quasi-trustees?

(3) Under what circumstances can a transaction between the cestui que trust and the trustee be upheld? What is the part played by the absence of independent advice, or legal advice, in such cases?

(4) What are the principles distinguishing a corporation as a legal entity, from its shareholders? Can the shareholders maintain a suit, when the corporation is alive as a juristic entity, and if so, under what circumstances? Can the erstwhile shareholders of a dissolved corporation institute an action to recover assets from a "fraudulent" trustee, as here, either under the English, American Law, or under Indian Company Law?

(5) The question of laches, and does it disentitle the appellants?

(6) The problem of Limitation in this case; viewed both upon the frame of the suit, and whether the remedies that could be given are timebarred.

(7) The actual determination and scope of the reliefs, if any, to which the plaintiffs (appellants) are entitled.

(25) "Constructive Fraud" is a creation of Courts exercising equity jurisdiction, directed against conduct which might be free from moral turpitude

or actual evil design, but which might cause injury in a confidential relationship, or of the public interest. Lord Haldane said in *Nocton v. Lord*

Ashburton, 1914 AC 932.

The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the

risk of the word "fraudulent" being applied to them. What it really means in this connection is, not merely fraud in the ordinary sense, but breach of

the sort of obligation which is enforced by a Court that from the beginning regarded itself as a court of conscience.

As observed by Cheshire and Fifoot (*The Law of Contract*, Fourth Edn., page 228):

In the case of certain transactions, equity obliges one of the parties, such as a solicitor who purchases the property of his client, to prove, not

merely that he was guiltless of untruthful statements, but that the transaction was advantageous to the other party. By refusing to uphold the

transaction, unless these requirements are satisfied, equity hopes to suppress the temptations which might otherwise be found too strong for the

party's virtue.

Pomeroy states in *"Equity Jurisprudence"* (Vol. 2), S. 922, upon this subject.

It (constructive fraud) covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions

voidable in equity because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the party

benefited the burden of proving his innocence, and the absence of fault.

The expression itself is not a very happy one; "since it embraces cases in which there has been no dishonesty." (Cheshire and Fifoot at page 228).

But the expression has come to stay, as a convenient designation of a category of legal wrongs, of which a court will take notice. In our own law,

the principle has received recognition in S. 88 of the Trusts Act, and "a constructive trust" is raised by a court of equity wherever a person clothed

with a fiduciary character gains some personal advantage by availing himself of his situation as trustee.

(See Lewin on "Trusts," (15 Edition) page 165). In Corpus Juris Secundum (Vol. 89, page 1015), the true principle of the raising of a

"constructive trust" is expressed as follows:

A constructive trust is a creature of equity, defined supra as a remedial device by which the holder of legal title is held to be a trustee for the

benefit of another who in good conscience is entitled to the beneficial interest.

The essence of this doctrine has been expressed, if we may say so with great respect, by Viswanatha Sastri, J., in Eswara Gowd v. Somasekhara

Gowd, 1956 Andh WR 911:

A transaction of purchase by a person occupying a fiduciary position under circumstances in which his own interests are or may be adverse to

those of the person who owns the property and whose interests he is bound to protect, is always regarded by the Courts with the utmost jealousy.

If such a transaction is impeached by the beneficiary whose interests have been adversely affected, the purchaser must show that there has been no

fraud, or concealment or advantage taken by him of information acquired by him by virtue of his position..... He must also show that the beneficiary

had independent advice, and every kind of protection in connection with the transaction of purchase.

We might also note that in Sheridan on "Fraud in Equity" (1957), the meaning of "constructive fraud" is discussed at page 24 in a lucid analysis.

(26) The doctrine of "Unjust Enrichment" has been dealt with in recent cases of

this Court, such as Govindarajulu Naidu and Others Vs. S.S.

Naidu alias Soundararajulu Naidu, , where a succinct history of this doctrine, particularly in relation to English and American systems of

jurisprudence, will be bound set forth. Reference may also be made to the Full Bench decision in Muppudathi Pillai Vs. Krishnaswami Pillai and

Others, . The doctrine was originally based in English Law upon the principle of assumpsit or "had and received," and came to be based more and

more on the doctrine of restitution. In the United States of America, the same principle evolved through concepts of assumpsit and then of quasi or

implied contract, to the final form of a doctrine of restitution (American Re-statement).

In this country, the principle was developed under Ss. 69 and 70 of the Indian Contract Act, and, as observed in Mahalingam Chettiar v.

Ramanathan Chettiar (App. No. 665 of 1948) (Mad). ""It is generally recognised that these sections (Sections 69 and 70) are much wider in scope

than the doctrine as applied in England, and go far beyond it."" Paboodan Goolabchand Vs. M.J. Miller and Another, is an instance of the

application of this doctrine, and a recent in stance is Nityananda Mudaliar v. Arunachalam Chettiar, 71 Mad LW 50, where the doctrine has been

applied to the facts, and the contributions of Lord Mansfield and of American Jurisprudence have been explained in detail.

For our present purposes, we may take the doctrines of "constructive fraud" and "unjust enrichment" as complementary to each other; if we find

that, in effect and substance, the first defendant company was unjustly enriched to the extent of about two lakhs, by means of a transaction with the

plaintiffs (appellants), to whom the first defendant company stood in a fiduciary capacity, even if the for of the transaction between the legal entities

of the "old company" and the "new company," we would be justified in piercing through these forms to the reality, and in holding that the first

defendant held their shares or interest in the new company constructively in trust for the appellants.

That would be all the more so, where, as in this case, the classic signs and symptoms of "constructive fraud" are present. That is where the

fiduciary relationship is undeniable, where the context of a conflict between interest and duty is equally undeniable, where the plaintiffs (appellants

had no disinterested advice, legal or private, and where the analysis of facts discloses an "unjust enrichment" of the "constructive" trustee.

(27) We now proceed to the next point for determination, the true nature of fiduciary relationship" and the existence or absence of it upon the

dates when the impugned transaction was settled as between the parties. It is contended on behalf of the first defendant company that they were

purely secretaries, not managing trustees of the estate; that they were given no wider responsibilities than those of secretaries working under the

Board of Directors, and that, in respect of the attempted sale of the estate, they were not agents for sale.

We consider that to regard the facts from this perspective of approach is to misconceive the principle of "fiduciary relationship" altogether. But,

even upon such a narrow ground, it could be shown that what the first defendant company claims is not quite true. In the very agreement under

which the first defendant took over as secretaries (Ex. A-5), clause 2 is a general one giving the secretaries an apparently large power to devote

their time to the business and affairs of the company in a sincere and faithful manner.

Even if this is to be construed ejusdem generis, as the learned Subordinate Judge held, it would at least indicate that the secretaries (first defendant

company) discharged wider functions than those of mere administrative assistants. Certainly, a case can be pieced out from the record to show

that, during the period of the attempted sale of the estate, the first defendant company functioned in a manner very similar to that of an agent for

sale as might be naturally expected from a concern of this standing and experience.

But we would put the matter upon a wider, and an altogether different ground: that is, the true character of the principle of "fiduciary relationship,"

as evident in the very extensive case-law. How little this character ordinarily derives recognition may be illustrated from an argument, actually

advanced in the present case, to the effect that there could be no "fiduciary relationship" between the appellants and the first defendant company,

because the appellants were merely the shareholders of the "old company" and distinct from that jurat entity.

Let us suppose, for a moment, that the entire body of shareholders of a private concern approach its solicitor for advice, and that, in consequence,

the company itself buys certain property from the solicitor to its disadvantage, and at excess value, because the solicitor abused the confidence

reposed in him. Could the solicitor then turn round and argue, in a suit to recover the "unjust enrichment," that he gave the advice to certain

individuals qua shareholders, and that, in consequence, there was no fiduciary relationship at all on that occasion? In other words, the argument is

based on a fallacy.

The fiduciary relationship may arise in the context of a jural relationship or it may not. Where confidence is reposed by one in another, and that

leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship

immediately springs into existence.

Once it springs into existence, it is for the person benefiting by the transaction to show that the other party was at equal advantage, that nothing

was concealed, that the other party had disinterested advice, and that the transaction itself was fair and without any element of "unjust enrichment."

Where that burden is not discharged, the Courts will interfere to restore what has been taken away, to the extent to which it constituted "unjust

enrichment."

(28) The case law upon this entire subject is extensive. Cases differ upon the facts, though the leading principles are clear and explicitly stated.

Again, the mere existence of "fiduciary relationship" does not inhibit a transaction altogether. The trustee may deal with the cestui que trust, but

upon his peril to show that the transaction could be upheld, by the tests we have already indicated. We propose to set forth here certain of the

text-book passages and decisions, in illustration of the principle and its application.

(29) Moulton L. J., said in *In re, Coomber*, 1911 1 Ch. 723 . "'They fiduciary relationships) extend from the relation of myself to an errand boy,

who is bound to bring me back my change, upto the most intimate and confidential relations which can possibly exists between one party and

another, or it may arise out of personal or domestic considerations.'" Kerr says (*Fraud and Mistake*, page 202). "'The disability extends in general

to all persons who, being employed or concerned in the affairs of another, acquire the knowledge of his property.'" In the instant case, this disability

arose from several vital considerations.

The plaintiffs (appellants) were the shareholders of the company, who could take the decision to convey the properties either to first defendant

company or to any new company promoted by them; in other words, first defendant company dealt with the appellants, knowing that they were

the parties who had the power and the right to effect the transaction. The fact that the "old company" was a different juristic entity makes no

difference in the context of this real situation.

The first defendant company were secretaries, exercising fairly wide powers and functions of looking after the estates under the directors. Both

Miss Dorothy Wapshare and her brother reposed confidence in the company. They also reposed confidence in Mr. Thorne, who could act for the

company, within limits, of course, as a trusted and important official in the concern. Further, the first defendant company were actively engaged in

aiding the plaintiffs (appellants) to sell the estates. They were so conscious of the conflict between interest and duty, particularly when they

themselves became possible competitors, that they actually expressed this embarrassment on one occasion. We are unable to see how it can be

doubted, upon those facts, that a fiduciary relationship exist between the parties.

(30) Of the English cases, we may refer to the following: 1911 1 Ch. 723, *Smith v. Kay*, 1859 11 ER 299, *De Witte v. Addison*, (1899) 80 LT

207, *Morlay v. Loughnan*, 1893 1 Ch. 736, *Dover v. Buck*, (1865) 66 ER 921 and *Ahearne v. Hogan*, 1844 D. Sug. 310, which last decision is

interesting, as it related to a doctor and a patient. We shall venture a brief observation upon each of these cases. In 1911 1 Ch. 712 it is interesting

to note that no member of the Court was able to give a test regarding which particular fiduciary relationship would give rise to a presumption of

undue influence, where the trustee benefits. This shows in a striking manner the pervasiveness of the concept.

In 1899 11 ER 299 the Court observed, "The principle applies to every case where influence is acquired and abused, where confidence is reposed

and betrayed (pages 310-311)" (1899) 80 LT 207 was a case in which the eldest daughter of a man was induced to mortgage her reversionary

interest, in order to save her father from being adjudged bankrupt. The deed was set aside, and it is very significant to observe that this was one of

the cases in which the person entering into the transaction had no independent legal advice.

In 1893 1 Ch. 736 observations are to be found to the effect that where the mental and physical condition of a person, though not amounting to

incapacity, were such as to render him peculiarly amenable to influences, independent legal advice is absolutely essential-"let the hand receiving it

be ever so chaste etc." (757758). (1865) 66 ER 921 was a case in which the transaction was actually upheld, because it satisfied every test of a

"constructive" trustee, or of a formal trustee, dealing with the cestui que trust.

(31) Of the Indian decisions, we might nearly refer to Sant Bux Singh v. Ali Raza Khan, AIR 1946 Oudh 129, Pydah Venkatachalapathi Vs.

Guntur Cotton, Jute and Paper Mills Co. Ltd. and Another, which was, pertinently enough, a case of secretaries, who had an interest in a

mortgage, though they had the plenary power to enter into the transaction on behalf of the company. Dubash D.K. Ahmad Ibrahim Sahib Vs.

A.K.R.M.K. Meyyappa Chettiar and Others, , Raghunath v. Varjivandas, ILR 30 Bom 578 and In Re: Perumal Goundan and Others, In

Demeara Bauxite Co. v. Hubbard, 1923 AC 673, the House of Lords held that a solicitor was bound to make the fullest disclosure of facts to a

client, and to deal with her fairly by every test, before his transaction with her could be supported.

(32) Mr. Nambiar, for the first defendant company, draws our attention to certain passages in Leiw on "Trusts," Kerr on "Fraud" etc., as well as

to cases in Coles v. Trecothick, (1804) 7 RR 167, Knight v. Majoribanks, (1848) 83 RR 166 and (1865) 66 ER 921, for the position that this

kind of transaction is not inhibited, that the trustee can purchase where there is no fraud, no concealment, no advantage taken from the cestui que

trust, and that inadequate consideration, by itself, is no ground for impeaching a transaction.

We have already referred to the general principle that such transactions are not inhibited, but that the trustee must satisfy the court with regard to

the several tests laid down. The fact that an adequate price was not paid would certainly lead to the inference that there was an "unjust enrichment"

of the trustee, and we are unable to agree that this is not important. There is only one case cited, viz., 1804 9 Ves 234 : 7 RR 167 in which

inadequacy of price was not considered a sufficient ground, but that was in relation to the facts of that particular case where the entire complex of facts indicates an inference opposed to constructive fraud."

The case law has to be applied in such matters with great care, in order to see that what is merely illustrative of individual facts is not misinterpreted

as laying down the law. We may give an instance here; Lord Esher M. R. said in *Barnett v. South London Tramways Co.*, (1887) 18 QBD 815,

that a secretary was merely a servant, and that his duty was to carry out orders. This does not imply that first defendant company had, in the

present case, merely fulfilled such a role (which they obviously did not), or that they were not in fact exercising wider powers and responsibilities.

(33) Regarding the absence of legal advice, or disinterested advice, which is a marked feature of this case, there is a passage in Halsbury (Second

Edition Vol. XV, Sec. 492 at page 274), to which our attention has been drawn, that proof of independent legal advice ""is not the only way of

proving," ""that the donor was acting independently of any influence.

We also note that in *Zohara Khathum Bi Bi Vs. Mahaboob Bi* by her son and agent, P. Abdul Haq Sahib, Leach, C. J. pointed out that

independent advice was not essential where the settlor was acting voluntarily and with full knowledge of the facts. Again, it is incontrovertible that

independent advice need not necessarily be from a lawyer.

But, where a fiduciary relationship exists, and a climate exists which was probably taken advantage of by the fiduciary, and there is an obvious

element of "unjust enrichment," the absence of such independent advice does become a material factor in judging the case.

(34) We shall now proceed to the intricate question whether the present plaintiffs (appellants) could maintain this suit, after the voluntary liquidation

of the "old company."

(35) Mr. Nambiar, for first defendant company lays down certain propositions about the law relating to corporations, which are well supported by

authority. He argues that (1) a company is a legal entity quite distinct from the shareholders, (2) that shareholders per se have no rights in the

properties of the company, and (3) that they cannot sue while the company subsists, on behalf of the company, except under very limited and

exceptional circumstances.

These propositions are well recognised, from *Gray v. Lewis*, (1873) 8 Ch. A. 1035 onwards. We may also refer to *Foss v. Harbottle*, (1843) 2

Hare 461 and *Burland v. Earle*, 1902 AC 83. In *Salomon v. Salomon and Co.*, 1897 AC 22, which is still good law, as text-book writers have

pointed out, the legal inference resulting from incorporation was affirmed. "The company" is not another name for the same person; the company is

ex hypothesi a distinct legal persona" (at p. 42).

These general principles have been recognised and re-affirmed in a series of Indian decisions. We might make reference here to AIR 1937 279

(Privy Council) , *Harihar Prasad Vs. Bansi Missir and Others*, , *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, and *N.V.*

Vaidyanatha Ayyar and Another Vs. Indian Bank Ltd., Tiruchirapalli and Others, . It was observed in 1902 AC 83 that

in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, the action should prima

facie be brought by the company itself.

The Supreme Court observed in *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, . It must not be overlooked that the

company stood dissolved on that date, and Sundaram Iyer had no authority to do anything on behalf of the company.

But we might immediately state that the doctrine is not so unqualified, as these decisions might make us suppose, at the first blush. For instance

even during the lifetime of the corporation, a recalcitrant majority might prevent a minority from taking action on behalf of the company, which

action is essential in the interests of equity and justice or fraud might have occurred, either on the part of the directors, who are quasi trustees, or of

other persons, and the company might not be willing to sue.

In such contingencies, the power of even of a minority of shareholders to sue has been recognised by courts. We think it is sufficient to refer, in this

context, to 1902 AC 83 where there is explicit authority for the view that complaining shareholders may sue in their own names, where the acts

complained of are fraudulent or ultra vires. Also see *Menier v. Hooper's Telegraph Works*, 1874 9 Ch. 350.

In the present case, we find that the directors of the "old company," who were quasi trustees, did later become major shareholders or partners in

the "new company." We find "constructive fraud" perpetrated by the first defendant company, which has led to their "unjust enrichment." The devices of transactions between the old and new companies, as distinct legal entities, are transparent, and cannot help to conceal or suppress the fraud. Under such circumstances, could not the plaintiffs (appellants) have sued during the lifetime of the "old company," and prior to its dissolution?

The answer is that they could have done so, even if they sued in their own names, and the company per se had refused to sue. Again, would there not have been an equitable estoppel, which would prevent the "fraudulent" trustee (first defendant company) from putting forward the claim that the suit was not competent, because the company is juristically distinct from its shareholders? Surely, such an estoppel would have operated, and the courts would have rendered justice, if the "constructive fraud" had been established.

(36) The matter is somewhat different with regard to a company which has gone into voluntary liquidation. Mr. Nambiar appears to assume in his arguments that the shareholders cannot at all sue after the dissolution of the "old company," because its legal personality has come to an end, and that this is upon stronger ground than the argument that the shareholders cannot ordinarily sue on behalf of a corporation, while it is alive.

On the contrary, our analysis of the matter leaves us in no doubt that this kind of a suit by ex-shareholders, after the dissolution of the company, to recover assets concealed by fraud, stands on a totally different footing. There are indications in the Indian Company Law that the shareholders are the true residuary legatees of even the debts and undistributed or concealed assets of a defunct corporation; unlike the case in England, where the Crown is the legatee, upon the doctrine of Bona Vacantia, statutorily recognised. Hence with regard to Indian Law at least, such a suit by the Ex-shareholders of a dissolved corporation seems to be perfectly maintainable.

Particularly in the case of fraud, equity and justice require that such plaintiff ought not to be non-suited by a formal objection taken by a "fraudulent" trustee. We can certainly comprehend that the statute of limitation might bar such a suit; but, short of this, we are unable to see how a "fraudulent" trustee can sustain an objection of this character to the form of suit.

As far as the "new company" (15th defendant) is concerned, all that it can plead is that it has bona fide developed the estates as a distinct legal entity, and that it is not liable to reconvey the corpus to the appellants. This branch of the argument certainly deserves consideration, and we will deal with it in due course.

(37) Thus, upon this aspect, we would hold that even during the lifetime of a legal persona like a corporation, its shareholders can maintain a suit for acts ultra vires, acts of fraud, etc. This is well supported by authority. After the dissolution of the corporation, the Indian Company Law appears to recognise the shareholders as the residuary legatees of undistributed or concealed assets, debts due to the corporation not recovered by the liquidator, etc.

In England, the doctrine of Bona Vacantia is statutorily embodied, and the Crown is the heir to the legal persona of the corporation, when it comes to an end. In American Law, it has been frankly and fully recognised that the share-holders succeed to the corporation after its dissolution, and could maintain such an action at law.

(38) Before proceeding to a further discussion of this aspect, we would refer briefly to the doctrine of piercing the veil" of a corporate personality, to which some reference will be found in *The Jawahar Mills Ltd. Vs. Sha Mulchand and Co. Ltd.*, . This development of judicial interpretation has been necessitated by the exigencies of modern industrial life. The rigorous formalism of 1897 AC 22 no longer holds the field.

In Freedman's "Legal Theory" (3rd Edn. page 400), the development will be found fully discussed. Reference is made to English cases, such as *Smith Stone and Knight Ltd. v. Birmingham Corporation*, (1939) 161 LT 371 embodying this doctrine. In Stone's "The Province and Function of Law." at page 202, the learned author makes mention of other examples "of the same frankly creative approach.

We would merely observe in passing that though this doctrine is not directly relevant to the present facts, except in the limited sense that it enables us to "pierce the veil" of the new company (15th defendant) in its own interest, and for its own advantage, still it is profoundly suggestive.

The law is not static, but is a dynamic process. The task of judicial interpretation is not merely to reiterate. Judicial interpretation can be creative,

but, of course within the limits of the most rigorous discipline, and in entire harmony with the boundaries of statute law, and previous growth. We

are induced to make these observations, because we find nothing in law in this country which prevents or prohibits the ex-shareholders of a defunct

corporation, from maintaining an action of this kind. Where such an action is being maintained, in order to recover the fruits of "constructive fraud"

from a trustee, we do not think that it is open to the trustee to resist the suit on the rigidly formal ground that the ex-shareholders cannot represent

the defunct corporation.

(39) In *Bacon v. Robertson*, 1870 15 Law Ed 499 it has been held that part of the stock holders may maintain an action in equity against the trustee

of a dissolved state banking corporation. In *Taylor v. Standard Gas and E. Co.*, (1938) 83 Law Ed 669 : 306 US 307 it was observed that the

doctrine of corporate entity will be disregarded, where to do otherwise would involve fraud or injustice.

In American Jurisprudence (Vol. 13, p. 1197, et seq) the rule has been laid down that, after the dissolution of a corporation, its property passes to

its stock-holders, subject to the payment of debts. Learned counsel for first defendant company draws our attention to certain dicta that dissolution

puts an end to the existence of a company. There is a passage from Ghosh's Indian Company Law, 10th Edn. Part II page 17, (at paragraph

1635), quoting Viscount Cave, to the effect that, after dissolution, the company ""no longer exists as a separate entity capable of holding property

or of being sued in any court."" In *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, , it is observed that ""a person who was a

member of a dissolved company has no locus standi.

But these statements of law do not really touch the crux of the matter now before us. It is true that under S. 559 of the new Companies Act, 1956,

(which is equal to S. 243 of the old Companies Act which is identical with S. 352 of the English Companies Act, 1948), a company could be

revived or restored to existence by the court within two years after dissolution, under appropriate circumstances, and upon the motion of parties

affected. But we are unable to concede the argument of Mr. Nambiar that after this locus paenitentiae, none can sue on behalf of the defective

corporation, even in a case of fraud.

First of all, the fraud itself might be discovered more than two years after the dissolution, and the argument might work havoc in certain cases,

where a fraudulent trustee might take pains to evade the action for just this period. Secondly, this has nothing to do with the question of succession

to the assets of a legal persona like a company, after the death of that person. That question must be solved, for the argument is irrefutable, that the

law cannot leave a hiatus with no one entitled in law to the estate. In England, the Crown is so entitled, and S. 354 of the English Act is to the

following effect;

Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company, immediately before its dissolution....

shall, subject and without prejudice to any order which may at any time be made by the Court under the two last foregoing sections, be deemed to

be Bona Vacantia.

In Buckley on "Companies Act" (13th Edn.), a very interesting case is cited where a company was wound up voluntarily, and the properties were

allotted between the three shareholders by agreement. An order was passed vesting the properties in the Crown in trust for the three shareholders,

under the general law, since the legal estate must be in some one.

(40) We have carefully scrutinised the procedure in Indian Company Law relating to undistributed dividends, unclaimed assets, etc., under S.

244(b) of the old Companies Act which is equal to S. 555 of the new Companies Act, 1956, and identical with S. 343 of the English Companies

Act, 1948), and also the rules made thereunder. This scrutiny shows us that the share-holders have been treated in company law of this country as

persons entitled to the residue of the assets of a company, during the process of liquidation.

Further, u/s 555(6), sub-cl. 7(a), sub-cl. 7(b) and sub-cl. (8), it is clear that an ex-shareholder might claim to be entitled to moneys in the

company's Liquidation Account, and that the transfer to the general revenue of the Central Government is to take place only after a period of 15

years, during which claims can be preferred. Even after this, the claim can be dealt with and orders passed for a refund.

This very definitely shows that the intention of the Legislature in this country was never to recognise the doctrine or principle of Bona Vacantia. It is

unfortunate that there is a lacuna in the new Companies Act 1956, and we are of the view that a provision should be enacted along the lines of the

English section 354, and in conformity with the development of law in the United States, vesting the right to properties of a defunct corporation in

the general body of the ex shareholders, or the surviving members thereof.

We conclude, upon this analysis, that an action of this kind is not prohibited by law, if it is otherwise in time, and neither the first defendant

company nor any of the ex-directors of the old company who have benefited by this transaction through "constructive fraud," can be permitted to

plead this formal defence in bar of suit.

(41) The remaining two questions of (1) laches on the part of the appellants and (2) of limitation, may be now dealt with.

(42) As regards laches, as already observed by us, the authorities have never proceeded to the length of saying that merely because of laches,

party should be held disentitled to relief. Passages from Kerr and Pomeroy, cited by the learned counsel for the first defendant company merely

proceed to the length of saying that, in certain circumstances, and in exercise of the judicial discretion vesting in court, laches may be held sufficient

to bar a party from suit. The last word upon this matter was probably spoken by Sri Barnes Peacock in *Lindsay Petroleum Co. v. Hurd*, 1873 5

PC 221:

"Now, the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine, where it would be practically unjust to give a remedy,

either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and

neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the

remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.

A mere delay or lying by, short of a bar of limitation, was held not to disentitle to relief. Lord Blackboard said in *Erlanger v. New Sombrero*

Phosphate Co., 1873 3 AC 1218 and cited in *Rochefoucauld v. Bowstead*, (1897) 1 Ch. 196.

I have looked in vain for any authority which gives a more distinct and definite rule than this;..... it must always be a question of more or less,

depending on the degree of diligence which reasonably be required, and the degree of change which has occurred, whether the balance of justice

or injustice is in favour of granting the remedy or withholding it.

In the present case, we are taking full cognizance of the laches, of standing by, and delay on the part of the appellants. We are not accepting it as a

sufficient explanation that they awoke to their rights when they read the "Mail" article already referred to, and consulted Dr. C. P. Ramaswami

Iyer. On the ground of laches. We disentitle the appellants to the reliefs that they prayed for, either for possession of any part of the corpus, or for

any re-conveyance from the new company of any part of it.

We hold that the estates have been developed by the new company, considerably beyond their original form and value, while the appellants stood

by, and that, hence, they can get no relief in this suit upon the basis of re-conveyance, or a decree for possession of any part. Further, though we

find that there was "unjust enrichment" to the extent of two lakhs, as nearly as we can judge, we are holding the appellants entitled only to a lesser

amount of Rs. 11/2 lakhs. Thus, on the ground of laches, we consider we have adequately punished the appellants by barring certain reliefs, and

that it would not at all be equitable to dismiss the suit altogether on this ground.

(43) The issue of limitation has also been argued at some length, and a few precedents have been cited. But the matter seems to be fairly simple,

and we have no ground to consider that this suit is time-barred. An initial difficulty arose with regard to the frame of the suit, and, particularly, the

very unfortunate manner in which the reliefs were worded in the plaint.

Though the plaint itself contained sufficient allegations, and traversed the facts sufficiently, to make it clear beyond doubt, that the appellants, were

seeking to recover a possessory interest, to recover possession of the corpus either by a decree for possession or through compelling a re-

conveyance, the reliefs were so unfortunately worded as to give rise to a possible interpretation that this was an equitable action to recover the

assets, to which Art. 120 of the Limitation Act applied.

Since that article provides for limitation of only 6 years, the suit would obviously be timebarred on this basis. Mr. Nambiar has drawn our attention

to three decisions, viz. In *Re: Perumal Goundan and Others*, , *Gurudas Pyne v. Ram Narain Sahu*, ILR 10 Cal 860 (PC) and *Crown Prosecutor*

Vs. Abdul Wahab and Another, , for the view that Art. 120 was the residuary article which applied to such claims of an equitable character, and

that the suit must be in time with reference to this article.

But, due allowance must certainly be made for unhappy or unfortunate terminology, particularly in the case of mofussil pleadings. We are

thoroughly satisfied from a scrutiny of the allegations in the plaint, of the several returns made by the office of the court when the plaint was

presented, and the actual issues framed in the suit, that this was understood to be, in essence, a suit for recovery of a possessory interest in

immovable properties, to which residuary Art. 144 would apply, if not Art. 142. We have no doubt at all that the parties understood the suit as

implying a claim for possessory interest and that they proceeded to trial upon this basis.

Again, S. 3 of the Limitation Act makes it clear that it is the plaintiff who must prima facie establish that the suit is in time, with reference to the

allegations that he makes in the plaint, and irrespective of the defences which might be later setup. Of course, we are not awarding to the appellants

here, wither the relief of possession of vesting of any part f the corpus, or the relief of reconveyance. But that is not because the bar of limitation

applies, for, if it did, the suit would be barred altogether, but because, in equity, we think that we ought to grant a far more limited relief in the form

of a charge on certain assets.

Mr. Nambiar has, subsequent to the arguments, filed an application with a copy of sale deed recently executed by the appellants in respect of the

Naduvattam estate, which plaintiffs originally undertook to re-convey, if the A to D Schedule properties were to be handed back to the old

company revived (16th defendant). This, according to him, shows that appellants were not serious about this undertaking in the plaint.

But we do not think that we can go into this question, for obvious reasons. The sale deed is post litem motam, and we have no idea at all of the

surrounding circumstances, and the true understanding between the parties to it. We, therefore, think that it has to be ignored altogether,

particularly as we are not granting the appellants any reliefs relating to the actual corpus of the estates.

(44) Learned counsel for first defendant has strenuously contended that the suit

is not sustainable under Art. 144, upon the authority of AIR 1931

196 (Privy Council) We have already pointed out that this suit, as we interpret it, would really be for the recovery of a possessory interest under

Art. 144; it is not in dispute that that is the article which applies to suits for possession of Immovable property, or an interest therein, not otherwise

provided for (see Ramabai Govind Vs. Raghunath Vasudeo, As observed by Chagla, C. J., in P.N. Films Ltd. and Another Vs. Overseas Films

Corporation Ltd., , the Limitation Act deprives a party of a valuable right, and, ordinarily, a benevolent construction, a construction favourable to

the party whose right may be taken away, should generally be adopted.

This is especially the case with regard to pleadings and their interpretation. But, assuming that the frame of the suit was under Art. 144, we are

quite unable to see how the suit was barred by limitation. The learned Subordinate Judge thought it was barred by limitation under this article, not

because of any intrinsic feature of the case or the pleadings, but because he calculated limitation, not from the sale deeds, Exs. A-1, A-202 and B-

368, as would normally be the case, but from 10-1-1938, when the first defendant company was put in possession of D and A Schedule

properties, and even from 1-11-1937, under the terms of the offer of the first defendant, Ex. B-23, accepted and adopted in the agreement Ex. B-

45.

Apart from the fact that the possession of the first defendant was certainly permissive during this period, it is obviously illegitimate to tack on two

different periods of possession by different parties under totally distinct sources of title or interest, to compute a period of adverse possession on

the whole. But this is not the argument that is now before us. The argument is that the suit may be in time if Art. 144 can apply to the facts, but that

Art. 144 cannot apply, because the appellants are not the old company, because they are not "owners" seeking to recover the possessory interest

from a party in adverse possession AIR 1931 196 (Privy Council) is heavily relied on for this view.

(45) We consider that this argument is based upon a mis-conception. Article 144 no doubt applies to a suit by an "owner" seeking to recover a

possessory interest against the party holding adversely to the true title. But it is also the residuary article which applies to every kind of suit to

recover a possessory interest, against the person who has no answer to that title or claim, unless it is the answer of adverse possession, which must, of course, be tried on the merits.

The facts in AIR 1931 196 (Privy Council) must be carefully scrutinised. That was a case in which the appellants sued upon a contract between a testator and his natural father concerning a testament of 1903, the effect of which was, according to the appellant, to impress the property with the character of an express trust in his favour.

The learned Judges observed that the suit would fail even if the contract relied on had been established, for the law in India did not recognise an equitable estate as distinct from a legal estate *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* IA Supp. 47 (PC) and *Webb v. Macpherson*, ILR 31 Cal 57 : 30 Ind App 238 (PC). The true remedy of the beneficiary was to call upon the trustee to convey to him, and that remedy was barred in that case under Art. 120 of the Limitation Act.

In the present case, we cannot further confuse the issue by reviving the argument about the incapacity of the plaintiffs to sue, since they are merely the ex shareholders of the old company. Since we find that they are not barred from such a suit, as persons entitled to the assets of the old company, or at least to pursue its assets in the hands of the "fraudulent" trustee, this argument has no force.

The plaintiffs sued to recover a possessory interest or the corpus itself, because they maintained that this corpus had been the subject of a fraudulent sale, virtually in favour of a fiduciary, who had exploited the situation of trust. They can hence claim to be the "owners" in the sense that they are the heirs at law of the estate of the defunct "old company," after its legal persona has come to an end, and we have already seen that in Indian Company Law there is an implicit recognition of this principle, while it is nowhere explicitly barred. Such a suit was certainly in time, and was not barred. Nor is the suit barred by adverse possession, whether of the new company, or of anyone else. We, therefore, hold that the suit is not barred by limitation.

(46) We have already indicated that the plaintiffs (appellants) are entitled to succeed in this appeal, at least as against the first defendant company, to the extent to which its assets (shares) are held in the new company; "piercing

the veil" of the corporate personality of the new company (15th

defendant) for this purpose. The same argument would apply to the ex-directors of the old company, who now hold shares in the new company.

But it appears that those who held such shares are dead, and that their legal representatives are not on record.

Under the circumstances, we allow the appeal in part by directing that a decree be now passed for Rs. 1 1/2 lakhs in favour of the plaintiffs-

appellants. This will be a charge on the shares held by the first defendant-company in the new Company. The costs awarded by the lower Court

will stand undisturbed. In regard to costs in this court, the plaintiffs are allowed institution fee, printing charges and advocate's fee of Rs. 2,000/-.

In other respects the appeal will stand dismissed without costs.

(47) Before parting with this appeal, we wish to place on record our high appreciation of the able, lucid and informed arguments at the bar of

Messrs. V. P. Raman and O. T. G. Nambiar who spared no pains to place before us all the relevant authorities which considerably lightened our

labours in disposing of a matter, raising several interesting and subtle question of fact and law.

(48) Order accordingly.