
(1942) 03 CAL CK 0001
In the Calcutta High Court
Case No : Suit No. 174 of 1941

The Calcutta Celluloid Works, Ltd.

APPELLANT

Vs

Labanya Mohan Ghatak

RESPONDENT

Date of Decision : 17-03-1942

Acts Referred:

Citation : (1942) 03 CAL CK 0001

Judgement

Gentle, J.—The Plaintiff Company claims from the Defendant Rs. 2,400 together with interest at 12 per cent. representing the amounts of the unpaid allotment money and three calls, each of Rs. 2, making Rs. 8 in all, upon 300 ordinary shares of the nominal value of Rs. 10 a share. Rs. 2 having been paid upon application, the claim is for the balance of the total sum payable upon each share. In his written statement the Defendant alleges it was agreed between himself and the Company that his application for shares should not take effect or be operative or enforceable until he was given the Company's latest Memorandum and Articles of Association, prospectus and a statement showing its financial position. These documents were not supplied and consequently the purported allotment to the Defendant was void and invalid. Further that he was induced to apply for the shares and to pay Rs. 600 on application on the faith of the fraud by, and misrepresentations of, the Company set out in paragraph 6, contained in the prospectus and other documents given to him before he made his application, and by reason of the wilful concealment of material facts in the documents. Alternatively, the representations were false and fraudulent to the knowledge of the Company or were made recklessly or carelessly as to their truth. In September, 1939, within a reasonable time after notice of the fraud and before he received any benefit, the Defendant repudiated and disclaimed any liability in respect of the shares. He counterclaims for rescission of the contract by which he obtained the shares, rectification of the register by removal of his name, and for return of the sum of Rs. 600 paid upon application. The further plea that this Court has no jurisdiction to entertain the suit was abandoned.

2. The Plaintiff Company contends that by reason of the delay by the Defendant

to take proceedings for rescission and rectification, he is not entitled to rely upon the defences of fraud and misrepresentation and concealment of material facts.

3. The transaction took place in March, 1939, at New Delhi where Mr. B.K. Banerjee, who described himself as the Company's Chief Organizer to sell its shares, saw the Defendant. As a result of an interview or interviews, on the 3rd March, 1939, the Defendant filled in, signed and gave to Mr. Banerjee an application form for 300 shares. Some days later he gave him a cheque for Rs. 600 representing Rs. 2 for each share payable on application, which cheque he post-dated to 1st April, 1939. By a letter dated the 29th April, 1939, the Company gave notice to the Defendant that it had allotted him 300 shares and requested payment of Rs. 600 allotment money by the 3rd July following.

4. On the 4th August, 1939, 7th November, 1939 and 18th January, 1940, the Company gave notice to the Defendant that three calls, each of Rs. 2, had been made and payment was demanded. Thus it is alleged by the Company that the balance of Rs. 8 for each share is now payable. The Defendant has made no payments.

5. At or about the time when the Defendant applied for these shares, Rai Bahadur S.K. Banerjee made a similar application for 200 shares. After receipt of the notice of the first call dated the 4th August, 1939, the Defendant wrote to the Company on the 5th September, referring to correspondence between Rai Bahadur S.K. Banerjee and the Company regarding some information required by him and by the Defendant. The letter continues that they both applied provisionally for the shares on the assurance of the Company's Chief Agent (Mr. B.K. Banerjee) that he would satisfy them with regard to certain further details about the Company and confirm through the Company the various statements made about it before the shares were actually allotted, which information had not been forthcoming. In those circumstances and in view of the verbal arrangement made with the Chief Agent, the allotment to the Defendant was premature and unauthorised, and the application having been made subject to the fulfilment of certain conditions, it did not satisfy the provisions of secs. 93 and 96 of the Companies Act. The Company had, therefore, acted irregularly in placing his name in the register of its members necessitating action by the Defendant under sec. 38 for rectification of the Register which was requested to be done, and a demand was made for the return of Rs. 600 deposited on the representation of the Chief Agent.

6. The Company replied on the 12th September, 1939, that failing payment of the allotment and call moneys the claim would be put into Court.

7. On the 25th September, 1939, the Defendant wrote to the Company repudiating that he was bound by the allotment and demanded payment of the Rs. 600 application money. He sent no reply nor acknowledgment when he received notices of the second and third calls in November, 1939 and January, 1940, and took no proceedings for rectification of the Register, before his written

statement was filed on the 21st July, 1941, namely, one year and ten months after he says he discovered the facts of the fraud and misrepresentation.

8. The Company was incorporated in 1934, its undertaking being the production of celluloid from which it makes sheets and rods which are utilised to manufacture celluloid articles. Originally the Company had a factory in Ballygunge but in 1939 these premises and the plant and machinery installed in the factory were acquired by the Calcutta Improvement Trust. The Company ceased to produce celluloid when its factory was so acquired and it now purchases its requirements.

9. The manufacture of celluloid involves the production of nitrocellulose, a highly explosive substance, for which a license is required under the Explosives Act. Camphor is an essential ingredient in the manufacture of celluloid, it is available in vast quantities in Japan but not in India save in Mysore where there are small quantities but not in any commercial sense. It is common ground that the Company made celluloid sheets and rods by treating waste celluloid with a solvent and from the paste so obtained it produced these sheets and rods. It did not at any time manufacture celluloid from raw materials. The Plaintiff's case is that the process from waste and scrap is that which is referred to in a brochure and pamphlet which were given to the Defendant prior to his application for shares. The Defendant's case is that these documents represented that the Company manufactured celluloid out of materials and ingredients indigenous in India; that there are sufficient natural supplies of raw material in this country to meet the world's demand; that it was the Company's intention to institute a training scheme to teach young men and ex-detenus to make celluloid articles from the Company's products and to extend cottage industrial development in such manufacture; that in the Company's report and balance sheet in 1936 (which was given to him at the same time as the other two documents) it is represented the Department of Industry, Government of Bengal, had accepted a scheme submitted by the Company for cottage industrial development. The Defendant says that all these statements were untrue, but believing in the truth of all the statements and relying upon them he entered into the agreement to purchase the Company's shares.

10. It is now convenient to refer to the oral evidence.

11. Mr. L.M. Ghatak, the Defendant, is now the Junior Controller of Military Accounts and Pensions, Lahore Cantonment. In March, 1939, he was the Deputy Financial Adviser, Military Finance Branch, Army Headquarters, New Delhi. He says that on the 3rd March, 1939, the Company's Chief Agent (Mr. B.K. Banerjee) saw him in Delhi. The meeting lasted for about two hours. They discussed at length the affairs of the Company. Banerjee told him it was the only concern in India which manufactured celluloid from raw materials which were indigenous in India and available in large quantities. The process was cheap and one-half of the costs of the Japanese production and he was shown a block of celluloid as having been made by the Company. Banerjee gave him a brochure, a

pamphlet and a copy of the report and balance sheet of the Company for 1936. He said he examined them and believed the statements in the documents and was persuaded by them and by what Mr. Banerjee told him to fill in an application form and to give his cheque for Rs. 600 for the application money. This cheque, it would seem, was handed to Mr. Banerjee some days subsequent to the 3rd March. The witness pointed out in detail the various statements in the three documents upon which he relied when making his application for the shares. Mr. Ghatak continued that he asked Mr. Banerjee to give him a prospectus of the Company, its Articles of Association and the document showing its financial position, and he said he definitely told Mr. Banerjee that after he was satisfied on production of these documents that in his opinion the Company was in a sound financial position, then only his application was to be valid, otherwise the money he had paid would have to be returned. He said these documents had never been furnished.

12. Mr. B.N. Pal is a Chemist and Inspector of Explosives with the Government of India. His area includes Calcutta. He said that he had no knowledge of a license being granted to anyone to manufacture nitrocellulose and he would have been aware of it had it been granted.

13. His Lordship considered the oral evidence and proceeded.

14. It is convenient at this stage to deal with the agreement pleaded in paragraph 1 of the written statement that the Defendant's application for shares should not take effect until he had been given the Memorandum and Articles of Association and other documents. I accept Mr. Ghatak's evidence that he asked for these documents to be supplied and that Mr. B.K. Banerjee promised to do so. I do not, however, think this was part of the bargain, or that there was an agreement upon the terms or to the effect which is pleaded. If the Defendant had made up his mind not to become a share-holder unless and until he had obtained these documents, I do not think he would have filled in, signed and handed over the application form. Again, he did not give his cheque for the money payable upon application until some time after he had handed over his application for the shares. The receipt for the cheque is dated the 13th March. When the cheque was given the promised documents had not been supplied, and it is unlikely he would have given his cheque if there had been an agreement as is pleaded in the written statement. The Defendant received the notice of allotment by the 3rd May in a letter from the Company dated the 29th April in which he was requested to remit Rs. 600 allotment money by the 3rd July, 1939. He sent no reply to this letter and did not repudiate the allotment or write that he was not liable to pay the Rs. 600 demanded. Further, he raised no question of an agreement nor wrote to the Company until his letter of the 5th September, 1939, six months after his application and four months after he had received notice of allotment. In my view the Defendant is not entitled to succeed upon the plea of the agreement in paragraph 1 of the written statement.

15. A few days before the trial commenced the Defendant's attorney wrote three

letters to the Plaintiff's attorney, each containing some further misrepresentations, in addition to those in the written statement, upon which reliance was sought to be placed. These were put forward at a very late stage and I allowed the objection by learned Counsel for the Plaintiff to an application for an amendment of the written statement by including the additional alleged misrepresentations.

16. The oral statements made to the Defendant by Mr. Banerjee and some of the statements in the brochure, pamphlet, and report and balance sheet by which the Defendant said he was persuaded to apply for the shares are not pleaded in paragraph 6 of the written statement. This is a defence of fraud and misrepresentation, each and every representation upon which reliance is sought to be placed must be given, and therefore I pay attention only to the statements which have been pleaded as misrepresentations inducing the contract to take shares. Similarly in regard to concealment of material facts in paragraph 8.

17. The statements in the brochure, pamphlet and report and balance sheet for 1936, which the Defendant said he believed, refer to and repeat the same subject-matter in various places. It is convenient to group these together:

(1) Manufacture of Celluloid:

(a) The cost of raw celluloid from Japan is Rs. 210 per 100 lbs., cost of production of the same in the Company's factory is Rs. 85 per 100 lbs.

We are the only manufacturers in India, We speak from experience. (Brochure, page 1).

(b) The first attempt to make celluloid was made by the late Maharaja Sir Manindra Chandra Nandi Bahadur of Kassimbazar, who has given life to so many industries in Bengal. The late Maharaja's attempt to manufacture celluloid did not succeed for want of expert knowledge.

We have his blessings in our success. (Brochure, page 8).

(c) What is celluloid? Celluloid as the name suggests is manufactured from vegetable cells called cellulose found abundantly in nature. India has all the ingredients, and in such magnitude that it can meet the world's demands. (Brochure, page 9, Pamphlet, page 6).

(d) Our determination is to develop and to make our country self-sufficient in matters of celluloid and make ourselves independent of foreign supplies. (Brochure, page 20).

(e) We are in a position to manufacture raw celluloid. Our factory is competent to produce raw celluloid sheets, rods, etc., worth Rs. 1,000 a day which can be converted into Celluloid goods worth Rs. 3,000 a day (Brochure, page 21).

(f) The capacity of the present equipment (is) for the production of 1,000 lbs. a day. (Brochure, page 30). (2). Training scheme and Cottage Industrial,

Development.

(a) The authorities (the Company) are indeed looking far ahead and propose to introduce from 1938 training classes for educated young men so that they can learn to manufacture celluloid goods. (Brochure, page 13).

(b) We have therefore decided to undertake the training of deserving young men of the Bhadralog class". (Brochure, page 29, Pamphlet, page 6).

(c) The objects of the Company are to train students in celluloid articles-making. (Brochure, page 30).

(d) The Company has a programme before them for the training of ex-detenus in celluloid industry. (Pamphlet, page 8).

(e) Details are given of the industrial training scheme at page 9 of the pamphlet.

(f) The scheme (Cottage industrial development) has already been accepted by the Department of Industries, Government of Bengal. (Report and Balance Sheet, 1936).

(g) Mr. J.N. Bose the founder of the factory, who spent about fifteen years in Japan to get training in celluloid manufacture (Pamphlet, p. 6).

(3) Photographs

There are photographs in the brochure of the exterior of the factory at page 3, interior of the factory at pages 6 and 7, the Board Room at page 5 and the Registered Office at page 19.

Non-disclosure and/or concealment of material facts.

18. His Lordship after considering the evidence proceeded.

19. I accept the testimony of the Defendant and his witnesses, all of whom gave evidence in a manner which commended itself as reflecting honesty and accuracy. I was particularly struck with the demeanour of the Defendant who gave his testimony in a way which conveyed truth and reliability. I have no hesitation in preferring their evidence to that given by the witnesses for the Company. Mr. J.N. Bose was one of the most unsatisfactory witnesses it has been my lot to see. Repeatedly he tried deliberately to avoid giving answers to questions. Mr. B.K. Banerjee, to say the least, was devoid of frankness. He did not disclose he is a Director of the Company until towards the end of his cross-examination, and previously endeavoured to give the impression that he is unconnected with it and ignorant of its affairs. Where-ever their evidence is at variance with the Defendant's testimony I unhesitatingly reject it and I disbelieve them entirely save where I have expressly stated to the contrary. Little reliance can be placed upon Mr. B.B. Gupta, an assistant of the Company, by which he is still employed. I do, however, accept his evidence that the Defendant's shares were allotted by a resolution passed at a meeting of the Board of Directors and to this extent I accept what Mr. J.N. Bose said. This

gentleman did not refer to any meeting of the Board at which calls were made upon the Defendant's shares. Mr. B. B. Gupta's testimony upon this was vague and indefinite. The non-production of the minute book has not been explained to my satisfaction. The Company must establish its right to obtain payment of the allotment money and the sums due upon calls and that the calls were properly made, before the Defendant is liable. Whilst notices of purported calls were given, I am not satisfied that they were in fact made. If the Company is entitled to succeed, the sum of Rs. 600 payable on allotment is the only amount which can be recovered.

20. I am satisfied that the Defendant believed the Company manufactured celluloid from vegetable cells called cellulose and that the vegetation from which these can be obtained is indigenous in India and that this country grows and can provide all the ingredients required in the manufacture of celluloid to meet the world's demand. He also believed that the Company's registered office was the whole of the large and imposing building reflected in the photograph at page 19 of the brochure; that the Company had the intention to institute a training scheme and to inaugurate or extend Cottage Industrial Development in the manufacture of articles from celluloid; that its scheme for this proposition had been accepted by the Government of Bengal; and that Mr. J.N. Bose had 1,5 years' experience and training in the manufacture of celluloid in Japan.

21. I hold that acting upon the belief in the above and upon the truth of the statements and the correctness of the photograph he was induced to apply and to pay the application money for three hundred shares.

22. The next question for consideration is whether the statements and the photograph were misrepresentations. If they or any of them were not true, undoubtedly this was to the knowledge of the Company. They concerned its affairs, the details and the correct position of which must have been known to it.

23. His Lordship after considering the evidence proceeded.

24. I have come to the conclusion that the brochure is a thoroughly dishonest, misleading and untruthful document intended to misrepresent the Company's affairs and capabilities to the public, especially to prospective shareholders who were invited to invest money in the concern at pages 1 and 18. All the statements and misrepresentations were made knowing their falsity with the intention that they should be acted upon, and to induce persons to subscribe for and take shares in the undertaking. The statements in the pamphlet and report for 1936 are also false and these documents having been given to the Defendant with the brochure they all form part and parcel of the same misrepresentations.

25. Learned Counsel for the Company relied upon the exception to sec. 19 of the Indian Contract Act which provides that

If such consent was caused by misrepresentation or by silence, fraudulent within

the meaning of sec. 17, the contract nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

26. It was argued that if the Defendant had exercised ordinary diligence he could have discovered the truth about the Company's position and affairs.

27. Ordinary diligence does not mean that every statement should be checked and its accuracy investigated. Business is and should be conducted upon the basis of honesty and good faith and not upon distrust. The statements in the brochure, pamphlet and report read and appear truthful. Further, during the interview between the Defendant and the Company's accredited agent, Mr. Ghatak made enquiries concerning the Company and its affairs. He was entitled to believe the answers which were given to him. He could not be expected to travel 1,000 miles from Delhi to Calcutta to satisfy himself of the correctness of the information given to him in the documents. Learned Counsel pointed out that there is an invitation by the Company in the brochure for anyone to visit its factory. Mr. Ghatak was not required to make this long journey to inspect the Company's factory in order to show that he made ordinary diligent enquiry. He could not have discovered the truth with the diligence which the section indicates.

28. Article 114 of the Limitation Act requires a suit for rescission of a contract to be brought within three years from the date when the facts become known justifying this relief to be obtained. It is accepted by the Company as pleaded by the Defendant, that he first became aware of the fraud and misrepresentation in September, 1939. Ordinarily, therefore, a suit by the Defendant for rescission will not be barred until September, 1942. If during the currency of the limitation period there is delay by a person in filing his suit for relief, such delay will not prevent the proceedings succeeding unless it shows waiver or abandonment or acquiescence or occasions alteration in the position of the other party. See *Athikarath Nanu Menon v. Erathanikat Komu Nayer* ILR 21 Mad. 42 (1898) , AIR 1929 679 (Lahore) , *Kissen Gopal Sadaney v Kally Prosonno Sett* ILR 33 Cal 633 (1905), and *Kedar Nath Samanta v. Manu Bibi* 16 C.W.N. 247 (1911), which were all cases of specific performance for which Art. 113 of the Limitation Act prescribes three years in which proceedings can be brought to obtain this relief. In *Peddamuthulaty v. N. Timma Reddy* 2 Mad. H.C.R. 271 (1864), it was held that when the legislature has prescribed a period in which a suit can be brought, the Court has no power to substitute a different period.

29. Learned Counsel for the Plaintiff Company did not dispute the correctness of the above principles and that they are applicable to suits for rescission of contracts. He contended, however, that in regard to a contract to take shares from a Company, even when winding up is not in progress, it is not solely a matter between party and party, that is to say, the Company and the share-holder, but other considerations arise such as the position of creditors and other share-holders. The register of members is open to inspection by the public who may be influenced by the names of the share-holders and, therefore, a member

of a Company should proceed without delay after discovery of the facts to obtain rescission of the contract by which he purchased his shares. Although proceedings for rescission may be brought within the statutory period, nevertheless if they are not taken promptly by the share-holder he is similarly affected as in the case of delay showing waiver, abandonment, acquiescence and the like.

30. It is common ground that rescission must precede rectification, and the Defendant must establish his right to obtain rescission before he can avail himself of the fraud and misrepresentation by the Company as a defence to the claim.

31. A large number of authorities were cited in regard to delay by a shareholder in bringing proceedings for rescission of his contract to take shares. Mr. Sinha, learned Counsel for the Company, placed particular reliance upon *The First National Reinsurance Co. v. Greenfield* [1921] 2 K.B. 260 at p. 277, Taite's case 3 Eq. Cas. 795 (1867), and *Pusarala Sanyasi v. Guntur Cotton, Jute and Paper Mills* AIR [1915] Mad. 325, which he cited. Mr. Sinha agreed, these are the only three cases in which the Company concerned was not in the course of being wound up. It also is common ground that when a company goes into liquidation the position of a share-holder is different to what it was previous to the winding up. The interests of other persons then arise and the shareholder's liability for unpaid share money is ex lege under sec. 156 of the Companies Act from the fact that his name is in the register of members: see *Hansraj Gupta v. N.P. Asthana* 37 C.W.N. 373 (P.C.) (1932), a decision of the Judicial Committee. A share-holder has no remedy against the company to obtain rescission of the contract and rectification of the register on the ground of misrepresentation unless before commencement of the winding up he had already started proceedings without delay or there was an agreement to abide the result of a similar suit by another share-holder: see *First National Reinsurance Co. v. Greenfield* (6). It is too late if he commences proceedings after liquidation has started, see *Richard Oakes v. William and R.P. Harding* L.R. 2 H.L. 325 (1867).

32. In Taite's case 3 Eq. Cas 795 (1867) inexcusable delay of one month in commencing proceedings for rescission was held to prevent rectification. In *The First National Reinsurance Co. v. Greenfield* [1921] 2 K.B. 260, a share-holder discovered, in December, 1919, fraud and misrepresentation by which he was induced to enter into a contract to take shares. He took no proceedings to obtain rescission and rectification but set up the above as a defence to a claim for moneys due upon the shares which the Company commenced in July, 1920, seven months later. In the judgment reference is made to a number of decisions upon the question of delay, all of which concerned Companies in the course of being wound up, and observations were made regarding the name of the share-holder being allowed to remain on the register after discovery of the misrepresentation and of a creditor inspecting the register and finding the shareholder's name included. It was held that proceedings for rescission and

rectification must be taken promptly irrespective whether liquidation followed such proceedings or not. In *Pusarala Sanyasi v. Guntur Cotton, Jute and Paper Mills* AIR [1915] Mad. 325, Sadasiva Aiyar, J., who delivered the judgment of the Court, referred to a number of English decisions, all of which concerned Companies in liquidation, and it was held that the right to rescind an allotment of shares on the ground of fraud and misrepresentation must be exercised at the earliest possible moment after the allottee became aware of it. As already pointed out, Mr. Sinha agreed that these are the only three decisions in which the Company concerned did not subsequently go into liquidation. He relied also upon the observations of Lord Cairns in *Scholey v. Central Railway Company of Venezuela* L.R. 9 Eq. 266n (1868). There the shareholder was held to have affirmed the contract and consequently on the facts his action failed to set aside the allotment. Lord Cairns at page 267 said as follows:--

The Court would be most careful to see in a Company going on and trading, in which the rights of the share-holders and, others varied from day to day, that a person coming to complain of misrepresentation of this kind and coming to avoid a voidable contract, came within the shortest limit of time which was fairly possible in such a case.

33. As the share-holder's proceedings failed as he had affirmed the contract, the observations of the learned Lord Chancellor were not required for the purposes of the decision.

34. Mr. Das, learned Counsel for the Defendant, referred to a number of cases, amongst which were the under-mentioned. In *Tennent v. The City of Glasgow Bank and Liquidators* L.R. 4 A.C. 615 (1879), Lord Cairns at p, 622 observed:

So long as the Company is a going concern a share-holder who has been induced to take up shares by the fraud of the Company has a right to throw back his shares upon the Company, without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The Company as a going concern is assumed to be solvent and able to meet its engagements and to have a surplus, and the Company being solvent, its duty to pay the repudiating shareholder what is due to him and to take the shares off his hands is an affair of the Company and not of its creditors

35. In *The Bwlch-Y-Plwm Lead Mining Co. v. Baynes* L.R. 2 Exch. 324 (1867) a Company sued a share-holder for calls. He pleaded that he was induced to become a shareholder by the fraud of the Company, that he had never recognised, since notice of the fraud, any rights or liabilities in him, nor received any benefit from his shares and within a reasonable time after notice of fraud he had repudiated the shares and given notice to the Plaintiff of his repudiation. Baron Bramwell, who delivered the judgment of the Court, at pages 326-327 observed:

Now, it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and

has repudiated it on the discovery of the fraud. This includes giving up all benefit from it, and restoring the other party to the same condition as before, as far as possible. Now the plea alleges all these facts--fraud, prompt repudiation and restitution, as far as possible. It must be good, therefore, at common law, and so we hold. Cases in equity, under the Winding-up Acts, have been referred to. On thorn we pronounce no opinion, save that they do not govern this case. It may be this Defendant is liable under the Winding-up Acts, or that he can otherwise be made, in equity, liable to creditors. No question of that sort arises here. There is replication, legal or equitable, that the Plaintiffs are suing as trustees for creditors or any one else. There may be no creditors and the action may be brought (we are far from saying it is) merely to indemnify those who have committed the fraud the Defendant alleges. But we cannot help observing that creditors trust those who are liable as shareholders--those against whom the Company is entitled to enforce the duty of shareholders. If the Defendant had got on the registry through forgery of his name, he would not be liable, though as much trusted by creditors as now: see per Lord Justice "Turner in "Ship"s case: *Re Scottish Bank* 2 D.J. & S. 544 (1865). But With this we have nothing to do. We have to decide a common law question. The authorities at common law are in the Defendant's favour, and the ruling of Mr. Justice Wills, at Guildford, in *Glamorganshire Iron and Coal Company v. Irvine* 4 F. & F. 947 (1866) is in point. Our judgment is for the Defendant.

36. The circumstances are the same in the last-cited and in the present cases. The Company was not in liquidation, the share-holder had not taken proceedings to obtain rescission when the facts were discovered, nevertheless it was held he was entitled to resist the claim made against him on the ground that the contract for his shares was induced by misrepresentation.

37. It is not easy to co-ordinate the several conflicting decisions and opinions. The observations of Lord Cairns in the *Tennent's* case L.R. 4 A.C. 615 (1879) were made some years after the opinion he expressed in *The Scholey's* case L.R. 9 Eq. 266n (1868) and are in accordance with the view of Baron Bramwell quoted above. In *The First National Reinsurance's* case [1921] 2 K.B. 260 it was emphasised that even in the absence of liquidation the fact of a share-holder, although being entitled to rescind his contract with a Company, delaying doing so might affect creditors who could inspect the register. The creditors' rights, however, save as against the Company itself do not arise until winding up commences. Until that event occurs the contract between the share-holder and the Company is one between the parties to it and the shareholder's liability arises under the contract and not from any statutory provision, the liability under sec. 156 only commences upon winding up. If the Company goes into liquidation after proceedings for rescission have been taken but before they are terminated, the rights of the creditors having then intervened, the question of the delay by the share-holder arises, as by that time the creditors are directly concerned and their personal rights may be affected. Except in regard to the three cases mentioned above, it is from this aspect that the observations and decisions are

made and given in the many cases in which the question of delay by a share-holder has been the subject of consideration. In *The First National Reinsurance*'s case [1921] 2 K.B. 260 and the Madras cases, observations in liquidation cases were followed and held to apply irrespective of winding up. These decisions are in conflict with the views expressed by the House of Lords in *The City of Glasgow*'s case L.R. 4 A.C. 615 (1879) and by the Court of Exchequer in *The Bwlch-Y-Plwm Lead Mining Co.*'s case L.R. 2 Exch. 324 (1867).

38. Having considered all the authorities which were cited I have come to the conclusion that I should prefer the views expressed in the last two mentioned cases. Apart from an agreement by which a person becomes a share-holder in a Company, when there has been fraud or misrepresentation inducing the contract, the injured party can resist a claim upon the contract made against him by the guilty party. Article 114 of the Limitation Act allows him three years in which to sue for rescission and proceedings commenced within that period will not fail on the ground of delay unless it shows he waived or abandoned his right or acquiesced in the contract or the other party is adversely affected. There is no evidence, indeed no suggestion, in the present case that Mr. Ghatak has done or caused any of these things. I see no difference in principle in regard to a contract with a Company to purchase its shares and any other contract save that upon winding up the liability of a share-holder is different as the legislature has provided a statutory responsibility but this arises only when liquidation commences.

39. I hold, subject to what I have to say with regard to repudiation, that the delay between September, 1939 (when the facts first became known to the Defendant) and July, 1941 (when the plea raised in the present suit was first put forward) does not prevent Mr. Ghatak from relying upon the fraud and misrepresentation inducing the contract as a defence to the Plaintiff's claim.

40. A contract induced by fraud or misrepresentation is voidable and not void.

41. The authorities are all unanimous and it is not disputed that upon discovery of the facts the injured party must promptly repudiate the transaction and unless he does so, he cannot successfully take proceedings to obtain rescission.

42. The position must be the same when a person is sued upon a contract and sets up the defence that he was induced to enter into it by fraud and misrepresentation entitling him to resist the claim made against him. Repudiation must be on the ground of the fraud and misrepresentation upon which he relies, to obtain rescission or as a defence to a claim against him upon the contract. If he repudiates the contract on other grounds he cannot avail himself of such repudiation when setting up fraud or misrepresentation. The Defendant became aware of the facts in September, 1939. It is contended that he repudiated the contract by his letters dated the 5th and the 25th September, 1939, and that this repudiation was on the ground of the fraud and misrepresentation pleaded in the written statement. In his first letter Mr. Ghatak wrote that the allotment to him

was premature and unauthorised because he had applied provisionally for the shares on Mr. Banerjee's assurance that he would satisfy the Defendant regarding further details about the Company before the shares were allotted, which information was not given, and return of Rs. 600 deposited in good faith on the representation of the Company's Chief Agent was demanded. In the second letter the Defendant said, he repeated that his signature to the application form and the amount of the application money were obtained in the circumstances stated in the previous correspondence and he was therefore not bound by the purported allotment. The letter concludes with a demand for repayment of Rs. 600 (the application money) obtained from him in the circumstances stated in his previous letter and "upon misrepresentation." Mr. Das contended that these concluding words refer to the fraud and misrepresentation in the brochure and other documents, and as the return of Rs. 600 could not be obtained unless the contract was first repudiated, it follows that the Defendant has done all required of him to effect repudiation. The letter of the 5th September mentions the representation of the Company's Chief Agent, which clearly means the promise or assurance of Mr. Banerjee to supply further information. The "misrepresentation" in the second letter must relate to the representations mentioned in the first letter regarding Mr. Banerjee's assurance. There is no reference in either letter to the fraud and misrepresentations in the brochure and other documents. In my view, the ground upon which Mr. Ghatak purported to repudiate was the failure to supply him with the additional information. The promise to do this is pleaded in the written statement as an agreement, the non-fulfilment of which made the allotment void and invalid. I have already held that this agreement has not been established. I am unable to find or to hold that the Defendant ever repudiated the contract on the ground of fraud or misrepresentation, upon which he now relies. Until his written statement was filed in July 1941 no reference was ever made by him to any fraud or misrepresentation which he discovered, he said, nearly two years previously. Prompt repudiation of a contract induced by fraud being required to enable the injured party to avoid the agreement, his failure to notify repudiation either promptly or at all would prevent him succeeding in proceedings for rescission of the contract and also it must follow that he cannot rely upon the fraud and misrepresentation of the Company to resist its claim. Consequently his defence upon these grounds must fail.

43. There is one further matter which arises, and although the conclusion to which I have arrived makes a finding unnecessary, out of respect for the arguments which have been addressed to me, I propose to deal very shortly with it. Learned Counsel for the Defendant contended that his client is entitled to raise in the written statement a counterclaim for rescission and rectification and for repayment of Rs. 600. The CPC makes no provision for a counter claim. Secs. 122 and 128 of the Code empower this Court to make rules for such procedure. The only reference to a counter-claim in the rules of this Court is to be found in the first schedule of the table of fees in Ch. XXXVI, r. 74 in which item 5 requires

a fee of Rs. 15 to be paid for filing and registering a written statement containing a set off or counterclaim. This can only mean that if a set off or a counter-claim can be filed, the prescribed fee is payable when this is done. Or. 8, r. 6, Code of Civil Procedure, enables a Defendant to claim a set off against a Plaintiff's demand and by Or. 19, r. 20, Code of Civil Procedure, a decree in such a suit shall set out the amount due to the Plaintiff and the Defendant respectively and shall be for the sum which appears to be due to either party. In *Nawbut Pattak v. Mahesh Narayan Lal* ILR 32 CAL. 654 (1905), Mookerjee, J., observed at p. 659 that if the amount due to the Defendant exceeds that due to the Plaintiff or if the Plaintiff's claim fails, then the decree will be one in favour of the Defendant. It is argued that the above rules and decision establish that a defendant can counter-claim in a suit and obtain a decree in his favour for the relief sought. I am unable to accept this argument. The Defendant purported to claim rescission and rectification and for Rs. 600 which he had paid to the Company upon application for its shares. None of these is a set off but are all separate and distinct claims. Some authorities from some other Courts were cited which seem to lend some support for Mr. Das' argument. I do not consider that as the rules of this Court at present provide, a Defendant can obtain relief by way of a counter-claim. He must file a separate suit against the Plaintiff for any claim which he makes against him.

44. I have already found that the Plaintiffs are entitled to recover only in respect of the moneys payable by the Defendant upon allotment of the shares; this amounts to Rs. 600. There will be a decree in favour of the Plaintiff Company for this sum, which will carry interest at the rate of 6 per cent. per annum.

45. This suit has taken many days to try, the major portion of which was occupied in hearing evidence and arguments on the allegation of fraud and misrepresentation which were denied and strongly resisted by the Plaintiff Company. They have failed upon the matters in issues arising from those allegations. In other respects save upon the question of repudiation and upon the agreement pleaded in paragraph 1 of the written statement the Defendant has substantially succeeded. The question of costs is one for the discretion of the Court which must of course be exercised judicially. Bearing in mind all the circumstances, the proper order to make is that each party shall bear its and his own costs.