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[425] EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

THE GUZERAT SPINNING AND WEAVING COMPANY *v.* GIRDHARLAL DALPATRAM AND ANOTHER.* [13th March, 1880.]

Indian Companies Act X of 1866, *s.* 22—*Member of company*—"*Subscriber of the memorandum*"—"*Agreement to become a member*"—*Company not in existence*—*Rescission*—*Liability for calls.*

The defendant, amongst others, subscribed (for 101 shares) a copy of the memorandum and articles of association of the plaintiff company then in process of formation, but subsequently, and before registration, gave notice to the persons most active in the promotion of the said company, that he would withdraw his signature, and would have no connection thenceforth with the proposed company. His withdrawal, however, was not accepted. Subsequently to the receipt of the said notice the memorandum and articles of association, so signed by the defendant and others, were presented for registration; but registration was refused, on the ground that the said documents were not printed. A printed copy of each was then procured and registered. The registered copies differed, in respect of the signatures subscribed thereto, from the copies signed by the defendant. The defendant's name was put upon the register of the company as the holder of 101 shares, but without the defendant's assent or knowledge, and two calls were made upon him in respect of the said shares. The defendant denied that he was a member of the said company, or liable for calls.

Held, that the defendant was not a member of the plaintiff company; either (i) as a "subscriber of the memorandum of association" under the earlier part of s. 22 of the Indian Companies Act, inasmuch as the memorandum there referred to was *the registered* memorandum, of which the document signed by the defendant was not even a true copy; or (ii) by reason of an "agreement to take shares" under the latter part of that section, inasmuch as the agreement there alluded to was an agreement *with the company*, and the agreement (if any) entered into by defendant was not, and could not have been, an agreement with the company, the company not being at that time in existence.

Quære—whether it is enough, to constitute a person a member of a company under the earlier part of s. 22, to subscribe a true copy of the registered memorandum of association.

[F., 12 B. 647 (655); R., 13 B. 1; 13 B. 415 (422).]

THIS suit was brought originally in the District Court of Ahmedabad, where the chief offices of the plaintiff company were situated; but, on the application of the defendants, it was transferred to the High Court at Bombay under its extraordinary jurisdiction.

[426] The case had been heard during several days before Green, J., all the evidence had been taken, and judgment reserved. Before judgment could be given, however, Green, J., became suddenly ill, and was obliged to proceed to Europe; and there being no prospect of his speedy return, an order was made, by consent of both parties, that the case should be heard by two Judges on the evidence taken before Green, J., and the appeal (if any) be directly from their judgment to the Privy Council.

The suit was brought to recover Rs. 53,341, the amount of two calls made on the defendants on the 21st February, 1877, and 15th July, 1877, being, respectively, calls of Rs. 250 a share in respect of 101 shares of the company alleged to have been subscribed for by the first defendant, Girdharlal Dalpatram.

* Suit No. 45 of 1877.

The second defendant was sued on the ground that he was the real owner of the shares, the first defendant having subscribed for them, it was alleged, merely as his nominee and trustee ; but in the course of the hearing before Green, J., the case against the second defendant was abandoned.

The facts of the case, so far as material, are as follows :—

The plaintiffs were a company formed for the purpose of erecting and working a spinning and weaving mill at Ahmedabad, under the following circumstances :—In 1876 it was resolved, by certain persons living in Ahmedabad, to form a new spinning and weaving company in that city, and a memorandum and articles of association were accordingly drawn and engrossed (but not printed) in Bombay, and sent up to Ahmedabad, in that form, for subscription. On the 2nd September, 1876, these were signed by the first defendant in Ahmedabad for 101 shares, and numerous other signatures were added thereto both in Ahmedabad and, subsequently, in Bombay. The memorandum of association provided, *inter alia*, that the firm of Jamnabhai Munsookbhai and Company, of Ahmedabad, merchants, (who were the chief promoters of the company), should be, on its formation, its treasurers and agents. On the 13th of December, in the same year, the defendant gave notice to a member of the said firm that he was no longer willing to become a share-holder in the said company, and would thenceforth [427] repudiate all connection with it. At the date of the said notice all the signatures subscribed to the original memorandum and articles of association had been already affixed. To this notice the said firm of Jamnabhai Munsookbhai and Company replied that they had no authority to release the defendant from the liabilities of a shareholder. In the month of January, 1877, the original memorandum and articles of association, so signed by the defendant and others, were taken to the Registration Office in Bombay, and presented for registration. Registration, however, was refused, on the ground that they were not printed, in accordance with the requirements of s. 16 of Act X of 1866. Printed copies of the memorandum and articles of association were then in existence ; and a copy of each was procured from Ahmedabad, and on the 16th January, 1877, these were registered in Bombay. The registered copies contained seven signatures, but the signature of the defendant was not one of them. Six of the said seven signatories of the registered copies had not been signatories of the original manuscript memorandum and articles of association, and the seventh appeared in the registered copy as a shareholder for a smaller number of shares than he had signed for in the original manuscript copy. The defendants' name was put upon the register as the holder of 101 shares, and subsequently the two calls in question were made upon him ; but the defendant refused to pay them, alleging that he was not, and never had been, a shareholder of the plaintiff company. Thereupon this suit was brought.

Starling (with him *Pigot*) for plaintiffs :—The defendant is liable to pay calls as a shareholder of the plaintiff company on three grounds : (i) on the ground that a signature to a copy of the memorandum and articles of association is as good as a signature to the memorandum and articles themselves ; (ii) that the terms of the memorandum and articles signed by the defendant amount, at least, to an agreement to become a member and take shares, which agreement will enure to the benefit of the company, when registered ; (iii) that the memorandum and articles so signed constitute the defendant a person who must be "deemed to have become a

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member of the company" under s. 22 of the Indian Companies Act X of 1866.

[428] As to the first point, Lindley, J., (1) commenting on s. 23 of the English Companies Act, 1862 (2), which is identical with s. 22 of the Indian Act, says: "the Act in substance declares that the subscribers of the memorandum of association and all persons who have agreed to become members, and whose names are entered in the register of members, shall be deemed members of the company. It is conceived that persons who sign copies of the memorandum before it is registered, are members under this Act, as they were held to be under the Act of 1856." And Mr. Buckley is of the same opinion: "the signature of a person," he says (3), "attached to a duplicate of the memorandum of association, and not being the copy which is actually registered, is sufficient to bind him." The authority cited in both cases is *New Brunswick Railway Company* v. *Boore* (4). That was a decision, it is true, on s. 11 of the Act of 1856 (19 and 20 Vic., c. 47), which is not identical with s. 23 of the Act of 1862 and s. 22 of the Indian Companies Act (5).

But it could not have been intended by the Legislature, when passing the later Act, to make any alteration in the practice in this [429] respect. If there had been any such intention it would have been clearly expressed. Having then signed a copy of the memorandum of association it was too late, on the 13th of December, for the defendant to withdraw; all the signatures had been then appended: *Kidwelly Canal Company* v. *Raby*(6); *Burke* v. *Lechmere* (7). Nor was it competent for a single signatory to withdraw without first obtaining the assent of the other signatories. *In re Oola Lead Companies*; *Palmer's Case* (8); *Smyth's Case* (9). In *Anandji Visram* v. *Nariad S. and W. Company*(10), where also a copy was signed before the memorandum was registered, the judgment proceeded on the ground that the two documents materially differed from one another, and it was on that ground that the defendant was held not to be liable as a shareholder.

Then, secondly, the articles of association of this company, especially the 10th and the 11th (11), constituted an agreement, on the part of all who

(1) Lindley on Partnership (3rd ed.), p. 174. (2) 25 & 26 Vic., c. 29.
(3) Buckley on the Companies Acts (3rd ed.), p. 40. (4) 3 H. & N. 249.
(5) 19 & 20 Vic., c. 47, s. 11:—
"The Memorandum of Association and the Articles of Association shall respectively bear the same stamps as if they were deeds. Any person signing a printed copy of the Memorandum of Association or Articles of Association shall be deemed to have signed such Memorandum and Articles respectively; and where the proper stamp has been duly fixed on such Memorandum of Association or Articles of Association it shall not be necessary to stamp any printed copy so signed: the execution by any person of the Memorandum of Association or Articles of Association shall be attested by one witness at the least; and attestation by one witness shall be sufficient attestation in Scotland as well as in England and Ireland."
Indian Companies Act, X of 1862, s. 22:—
"The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."
(6) 2 Price, 93. (7) L. R. 6 Q. B. 297. (8) Ir. Rep. 2 Eq. 573.
(9) *Ibid*, p. 603. (10) 1 B. 320.
(11) Articles 10 and 11 of Articles of Association referred to above:—
"10. An application signed by or on behalf of the applicant for shares in the Company followed by an allotment of any shares therein, or the signing of the provisional Memorandum of Association of the Company by any person previously to these

had signed the articles and the memorandum of association, with the company to take shares, of which agreement, when registered, it could take advantage; and that apart, altogether, from the provisions of the Indian Companies Act. And, in this view, it matters not at all that the copy of the articles signed is not the copy which was registered. The memorandum and articles, when signed, amounted to an authority to the promoters to register the company, and an undertaking, on the part of [430] the signatories, to become shareholders of the company, when registered, to the extent of the shares subscribed for.

Then, thirdly, the defendant is to be "deemed to be a member of this company" under the latter part of s. 22 of the Indian Companies Act (1), since he is "a person who has agreed to become a member of the company, and whose name is entered on the register of members." The Act says nothing as to the time when such an agreement must have been made. The agreement may be made at any time before, as well as after, registration. All that is necessary is, first, that there should be such an agreement; and, secondly, that the name of the person so agreeing should be afterwards entered on the register, which was done in this case. If agreements entered into before registration are not to be held binding, promotion of companies will become impossible. Signatures to documents of this kind involving agreements are irrevocable (*In re London Coal Company* (2)); and this is a contract which the company, and not only, as was argued below, the other signatories can enforce: *Currie's Case* (3).

Lang (with *Macpherson*), for defendant.—There are only two ways by which, under s. 22 of the Indian Companies Act, a man can become a member of a company: (i) by signing the memorandum of association, and (ii) by agreeing to take shares. Now, as to the first mode of becoming a member, it cannot be said that the defendant became a member of this company by signing its memorandum, unless it is held that the memorandum and a copy of the memorandum are one and the same thing. There is only one "memorandum," which is the registered memorandum, and that the defendant did not sign. There is no authority for saying that, under the English Companies Act of 1862, or the Indian Act of 1866, signing a copy of the memorandum is enough. In the earlier Acts, both English (4) and Indian (5), it was expressly provided that the signing of a printed copy of the memorandum or articles of association should suffice. That provision [431] is omitted in the later Acts now in force, thereby showing the intention of the respective Legislatures that it should not be enough thenceforth to sign a copy, even a printed copy: here the copy signed was not even printed, but in manuscript. It is clear from other sections of the Indian Act that "the Memorandum of Association" talked of, is

presents, shall be an acceptance of shares within the meaning of these Articles; and every person who thus, or otherwise, accepts any shares, and whose name is on the register, shall, for the purpose of these Articles, be a share-holder.

"11. The money (if any) which the Directors shall, on the allotment of any shares being made by them, or after the signing of the provisional Memorandum of Association, require or direct to be paid by way of deposit, call, or otherwise in respect of any shares allotted by them, shall immediately on the inscription of the name of the allottee in the register of members as the name of the holder of such share or shares, become a debt due to and recoverable by the Company from the allottee thereof, or the signatory of the provisional Memorandum of Association, and shall be paid by him accordingly."

(1) See note 5 B. 428.
(2) L. R. 5 Ch. Div. 525.
(3) 3 DeG. J. & Sm. 367 (377).
(4) 19 & 20 Vic. c. 47, s. 11. See note 5 B. 428.
(5) Act XIX of 1857. s. 9, identical with 19 & 20 Vic., c. 47, s. 11.

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the registered memorandum and no other. Section 11 says "the memorandum shall, when registered, bind the Company, &c." Section 7 says: "the Memorandum and the Articles of Association shall be delivered to the Registrar, who shall retain and register the same." Section 18: "Upon the registration of the Memorandum of Association, &c." And that is the view of the Act taken in *Anandji Visram* v. *Nariad S. and W. Company* (1). The only case in which this point was directly considered was *Palmer's Case* (2). There, no doubt, signing a copy, *with other circumstances*, was held to make a man a member; but it is clear, from the judgment of the Master of the Rolls (3) in that case, that signing alone would not have been enough. As for the passages cited from Lindley (4) and Buckley (5), those opinions were founded on the case of *New Brunswick Railway Company* v. *Boore* (6), a case under the old Act of 1856 (7), which permitted signing a printed copy.

[M. MELVILL, J.—Supposing the signed document had been registered, do you say that you had withdrawn in time, and would not, in that case even, have been bound?]

Even in that case we should not have been bound. We may withdraw any time before registration. In *Duke's Case* (8), Jessel, M. R., says: "Before registration the contract contained in the memorandum may be varied, rescinded or modified." It is merely a contract; we may break it if we choose; perhaps we may be liable to an action; but, at any rate, we cannot, after rescinding it, and against our will, be put on the register. However, that point does not arise in this case, as the copy signed, was never registered. And, moreover, in this case the registered memorandum [432] was not even identical with the copy signed. The signatories to the two documents were different; most of the names on the registered memorandum were those of unsubstantial people, mere nominees of the secretaries, treasurers and agents.

Then, as to the second mode of becoming a member of a company, *viz.*, by agreeing to take shares, under the latter part of s. 22 (9) of the Indian Act. The agreement there talked of is an agreement with the company. There can be no agreement with a company made at a time when the company has no legal existence. Our agreement (if any) was made when the company did not exist; it was an agreement with certain persons to take shares in the company when it should have come into existence. That was not an agreement with the company; the company cannot sue on it; if there is any right of action against us, it must be in our co-signatories. If we are bound to the company to take shares, the company must be bound to us to give us shares; but where is there evidence of any such obligation on the part of the company? It is not contended that we communicated with, or recognized, the company in any way after it came into existence; we were put on the register without our knowledge or assent, and when a call was made on us we at once repudiated liability for it. Nor did the company ever communicate with us: so, if we did ever offer to take shares, the company never accepted that offer, and without such acceptance there is no contract: *Pellatt's Case* (10).

(1) 1 B. 320. (2) Ir. Rep. 2 Eq. 573. (3) At p. 603.
(4) On Partnership (3rd ed.), p. 170. (5) On Companies Acts (3rd ed.), p. 40.
(6) 3 H. & N. 249. (7) 19 & 20, Vic. c. 47.
(8) L. R., 1 Ch. Div. 623. (9) See note 5 B. 428.
(10) L.R. 2 Ch. 527.

An application for shares may be withdrawn before allotment: Buckley on Companies Acts, pp. 46, 47; *Ramsgate Hotel Company* v. *Montefiore* (1); *Ritso's Case* (2). The company was not bound to have allotted us shares if we had applied; how, then, can we be bound to take them?—*Wolverhampton Company* v. *Hawkswath* (3). *Kidwelly Canal Company* v. *Raby* (4) turned altogether on the precise terms of the Act of Parliament incorporating the plaintiff company, and *Burke* v. *Lechmere* (5) on the meaning of the words "subscribers" as used in the Companies' Clauses Consolidation Act, 1845. The document we signed might possibly, if we had not withdrawn our signature, have amounted to an authority to [433] apply for shares on our behalf; but, even then, we should have had a *locus penitentiæ* until notice of acceptance of our application, or actual allotment. And neither can the company found their case on the terms of ss. 10 and 11 of the articles of association(6) that we signed, for they were not parties to that document, nor was the document we signed the "provisional memorandum" referred to in those articles. That is clear; for the memorandum the defendant signed was intended to have been registered, and was, therefore, not provisional. In *In re London Coal Company*(7) the memorandum signed was the one registered; so that case does not apply. In no way could we be treated as shareholders after our notice of withdrawal on the 13th December, 1876.

Starling, in reply.—A company can take advantage of agreements made prior to its formation: *Touche* v. *Metropolitan Warehousing Company* (8), *Spiller* v. *Paris Skating Rink Company* (9). The offer to accept shares could not be withdrawn, and was therefore still in existence when the company was formed: *Palmer's Case* (10). The Company, when formed, accepted that offer, and treated defendant as the owner of the number of shares applied for, and he is, therefore, liable for the calls. The agreement contemplated by s. 22 (11) of the Indian Companies Act is not necessarily one made after the company has come into existence. The words used are "has agreed," and not "shall agree."

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C. J.—We think that this case may be decided at once in a few words. It is unnecessary to do more than consider the provisions of s. 22 of the Indian Companies Act X of 1866, as explained and illustrated by reference to other sections of the Act, especially ss. 17 and 18, and apply these provisions to the facts before us. Section 22 defines the persons who are to be considered to be members of a company. The first branch of the section says: "The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have become members of the company whose memorandum they have subscribed, and upon registration of the company they shall [434] be entered as members in the register of members hereinafter mentioned." Now, it is clear from reference to other sections, especially ss. 17 and 18, that the memorandum of association, of which s. 22 is conversant, is the registered memorandum. That was the view of s. 22 taken in

(1) L. R. 1 Ex. 109. (2) L.R. 4 Ch. Div. 774. (3) 6 C.B. N. S. 336.
(4) 2 Price, 93. (5) L. R. 6 Q. B. 297.
(6) See note 5 B. 429. (7) L.R. 5 Ch. Div. 525. (8) L. R. 6 Ch. Ap. 671.
(9) L. R. 7 Ch. Div. 368. (10) Ir. Rep. 2 Eq. 573.
(11) See note 5 B. 428.

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the case of *Anandji Visram* v. *Nariad S. and W. Company* (1), where it was said "s. 22 of the Companies Act of 1866 provides that the person signing the memorandum of association shall be regarded as a member; and, taking the 17th and 22nd sections together, the memorandum here spoken of must be the registered memorandum of association." To that view we adhere. In this case the document which the defendant signed is not the registered memorandum. It has been argued that the signing of a copy of the registered memorandum is equivalent to signing the registered memorandum, and two cases have been cited in support of that proposition. But the first (*Smyth's Case*(2) is apparently against and not for that contention, and in the second (*Palmer's Case*(3)) Palmer had, by many acts subsequent to his signature of a copy of the memorandum of association, identified himself with, and treated himself as a member of the company; and he was, on all those grounds together, and not merely because he had signed a copy of the memorandum, held to be estopped from denying the membership. But even supposing, though not by any means deciding, that this contention is well founded, it does not help the plaintiff in this case, for the document signed by the defendant is not a copy of the registered memorandum of association, and, in fact, materially differs from it.

The 22nd section then continues: "Every other person who has agreed to become a member of a company under this Act, and whose name is entered in the register of members, shall be deemed to be a member of the company." By these words we understand that every other person who has agreed *with the company* to become a member, and whose name is entered in the register, shall be deemed to be a member; and we think that s. 18 supports this view. These two sections indicate that the agreement which is to bind a party must be an agreement with the company itself. **[435]** Neither the memorandum nor the articles of association which the defendant signed, which are the documents on which the plaintiff's case against the defendant is founded, form an agreement with the company. There was no company in existence, at the time those documents were signed, to agree with. The company had not then been incorporated, the memorandum of association not having been registered. If these documents formed a contract with the company, the company could have been compelled to allot 101 shares to the defendant, but we fail to see how defendant could have compelled them to do so. *Kidwelly Canal Company* v. *Raby* (4) has no bearing on this case: the Act of Parliament there involved contained the words "*have subscribed* or may hereafter subscribe."

We, therefore, hold that the defendant was not a member of the company, and was, therefore, not liable to pay calls, and dismiss the plaintiff's suit with costs.

With the consent of both parties the Registrar of the High Court, Appellate Side, was directed to ascertain the amount of defendant's costs payable by the plaintiff in the manner and according to the scale regulating costs in suits in the Mofussil Courts.

Solicitors for plaintiffs.—Messrs. *Bhaishanker and Dinsha.*

Solicitors for defendant.—Messrs. *Rimington, Hore, Conroy, and Brown.*

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(1) 1 B. 320 (328).
(2) Ir. Rep. 2 Eq. 603.
(3) Ir. Rep. 2 Eq. 573.
(4) 2 Price, 93.