

would be probably obtained if the land were let for building purposes. Such portion of it as is required for the annual fair, which is one of the objects of the trust, should be reserved. The lease should be for the [646] usual period of ninety-nine years, and should contain the usual covenants to build, repair, &c.; due provision should be made for the surrender or removal of the building at the close of the period on such terms as are customary in Bombay. The rental should be such as would make the arrangement beneficial to the trust, considering the market value of the land. I am of opinion that a lease fulfilling these conditions would be within the powers of the trustee.

As regards the money which is required to meet the expense of repairs and maintenance, it will evidently have to be raised in some way as a charge, either temporary or permanent, on the trust property. I am of opinion that such a charge, limited to the purposes of necessary repairs and maintenance of all the objects of the trust, would not be beyond the intention of the testator. But I cannot discuss any details as to amount or particular work to be done, as under this section of the Act I have no controlling power. I consequently think the sanction of the Court should be obtained to any charge.

As regards question (b), I have already stated that I cannot advise as to the particular lease, and I have no power under the section to sanction it. Question (c) I have answered already.

As regards costs, I think the petitioner and the Advocate-General are entitled to their costs out of the fund, to be taxed as between attorney and client. As regards Mr. Lang's client, he appeared on notice, and he is entitled to his cost of appearance in chambers, but exclusive of his affidavits, which ought not to have been filed. I think Mr. Inverarity's client, who appeared without notice, and at his own risk, had no *locus standi* in such an application as the present one. He must pay his own costs. I certify for counsel.

Attorneys for petitioner: Messrs. *Craigie, Lynch and Owen.*

Attorneys for other parties: Messrs. *Crawford and Buckland*; Messrs. *Ardksir, Hormasji and Dinshaw*; and Messrs. *Little, Smith, Frere and Nicholson.*

12 B. 647.

[647] ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

THE IMPERIAL FLOUR MILLS COMPANY, LIMITED (*Plaintiffs*) v.  
W. T. LAMB (*Defendant*).<sup>\*</sup> [1st and 2nd May, 1888.]

*Company—Indian Companies Act VI of 1882, s. 45—Member—Signing unregistered copy of memorandum of association—Agreement to become a member—Proposal—Acceptance—Repudiation before registration of company.*

On the 13th April, 1886, Lamb signed a printed copy of the proposed memorandum of association of a projected company for ten shares which on the 3rd August was registered as a Imperial Flour Mills Company. On that day, *viz.*, the 3rd August, 1886, Lamb received a notice from the secretary of the company, informing him that the company had been duly registered, and requesting him to pay

<sup>\*</sup> Small Cause Court Suit No. 511 4890 of 1888.

1888

MAY 2.

ORIGINAL

CIVIL.

12 B. 647.

Rs. 100 as the deposit on the shares subscribed by him. On the 5th August, Lamb replied, stating that he had decided not to take up the shares. On the 6th August the secretary wrote to Lamb, stating that he had already become a shareholder, and could not withdraw. On the 25th September the directors held their first meeting, and resolved that the "shares applied for be allotted, and application and allotment monies be called in." On the 1st October the secretary notified to Lamb the allotment of ten shares, and requested him to pay the overdue deposit call of Rs. 10 per share and the allotment call of Rs. 15 per share. Lamb refused to pay, and repudiated his liability in respect of the shares. He contended that he had never become a member of the company.

*Held*, that the defendant was not a member of the company, and was not liable to the plaintiff's claim. The fact that he had signed the proposed memorandum of association did not make him a member, inasmuch as the document which he had signed was not the document which was registered, nor even a true copy of it. Nor could the defendant be held bound as having agreed to become a member within the meaning of s. 45 of the Indian Companies Act VI of 1892. The agreement which binds a party under this section must be an agreement with the company itself. The company not being in existence at the date of the defendant's signing the memorandum of association (*viz.*, the 16th April 1886), that signature could amount, at the most, to an application for shares to the promoters which by reason of its non-withdrawal before the registration of the company on the 3rd August became on that day an application to the company. There could be no acceptance of that application until the company was registered; and the defendant withdrew his application by his letter of the 5th August. The letter written by the company's agents on the 3rd August was not an acceptance. It was only a request for the payment of the deposit on the shares for which the defendant had applied, and which was required as a guarantee for the *bona fides* of the application. Further, the terms of the resolution of the board of directors of the 25th September made it clear that up to that date of the defendant's application [648] had not been made a binding agreement by acceptance. His repudiation, therefore, of the 5th August was in time, and he could not be held liable as a shareholder of the company.

*Held*, also, that in no case could the defendant have been bound by the letter of the 3rd August written by the agents of the company. That letter was written, not by order of the directors at a meeting duly convened and composed of the proper quorum of four. It was written by the secretary after consulting separately three only of the directors. This was an irregular proceeding, which would not bind the company or the subscribers with regard to the application for and acceptance of shares. The directors did not act as a board, nor was the consent of a quorum obtained.

[R., 13 B. 415 (422).]

RE-HEARING under s. 38 of the Presidency Small Cause Courts Act XV of 1882.

The suit was filed in the Small Cause Court, and was heard by the Chief Judge of that Court, who, on the 22nd March, 1888, passed a decree for the plaintiffs for Rs. 1,086-11-0 and costs. The defendant then obtained an order from the High Court for a re-hearing under the above section of Act XV of 1882. The suit now came on before Scott, J.

The plaintiffs claimed to recover Rs. 1,086-11-0 from the defendant, being the amount of four calls of Rs. 25 per share, on ten shares held by him in the plaintiff's company, together with Rs. 86-11-0 interest.

The defendant contended that he was not a shareholder in the company, and that his name had been improperly placed on the register; that there never had been any complete contract by him to take shares, and that his application for shares had been withdrawn before any shares were allotted to him; that the memorandum of association which he had signed was not the memorandum which was registered; and that, therefore, he had not become a member of the company by reason of his having signed the memorandum; that his signature to the said memorandum was not attested, as required by ss. 11 and 39 of the Indian Companies Act

(VI of 1882) ; that he had never signed any application for shares except the said memorandum ; and that the company had acquiesced in his refusal to take up the shares, and were now precluded from making any claim against him.

[649] It appeared that on the 13th April, 1886, the defendant had signed a copy of the company's memorandum of association. The company was registered on the 3rd August, 1886. The memorandum of association, which was registered, was not the document which had been signed by the defendant, and it differed in some respects from that document. On the same day (3rd August, 1886) the defendant received the following notice from the agents of the company :—

“ *Bombay, 3rd August, 1886.*

“ Dear Sir,—We have the pleasure to acquaint you that the company has this day been duly registered, pursuant to the provisions of the Indian Companies Act of 1882.

“ We will, therefore, thank you to pay into the Hongkong and Shanghai Banking Corporation the sum of Rs. 100, being deposit of Rs. 10 *per share* on shares subscribed by you in the above company.”

To this notice the defendant replied on the 5th August as follows :—

“ *5th August, 1886.*

“ Gentleman,—Yours to hand this morning. As my terms of agreement expire in the course of a few months, and not knowing whether I shall stay in this country, I have decided not to take up the shares for the present.”

On the next day the agents wrote the following letter to the defendant :—

“ *6th August, 1886.*

“ Dear Sir,—We have received your note dated 5th instant, and have noted its contents. You have legally become a shareholder of the company when you have signed the articles and memorandum of association, and since the company is registered, you cannot now withdraw your shares. Hoping, therefore, that you will be good enough to pay your deposit in the bank.

We remain, &c.”

On the 4th September the agents wrote again to the defendant as follows :—

“ *4th September, 1886.*

[650] “ Dear Sir,—We have to draw your attention to our letter dated 3rd August last, asking you to pay into the Hongkong and Shanghai Banking Corporation the sum of Rs. 100, being the deposit of Rs. 10 *per share* on ten shares subscribed by you in the above company which still remains unpaid. Please pay the same on or before the 10th instant.”

To this letter apparently the defendant did not reply.

On the 25th September, 1886, the directors held their first meeting, and resolved that “ the shares applied for be allotted, and application and allotment moneys be called in,” and on the 1st October the agents sent the following notice to the defendant :—

“ Letter of Allotment.

“ *Bombay, 1st October, 1886.*

“ Dear Sir,—We beg to inform you that the directors of the above company, at a meeting held on the 25th day of September, 1886, have, in compliance with your request, allotted you ten shares in the company.

1888

MAY 2.

ORIGINAL

CIVIL.

12 B. 647.

1888  
MAY 2.  
—  
ORIGINAL  
CIVIL.  
—  
12 B. 647.

"You are, therefore, requested to pay the allotment call of Rs. 15 per share to the Hongkong and Shanghai Banking Corporation on or before the 15th instant, who will grant receipt for the same; in default whereof, interest at the rate of Rs. 9 per cent. per annum will be charged."

To this notice the defendant did not reply until the 11th November, when he wrote as follows:—

"11th November, 1886.

"Sirs,—Your note to hand. I told you in my letter, some months back long before any allotment was made, that I should not take up the shares in my name, as my time is up in March. So you may take what steps you like. I am prepared to meet them, as I shall not pay them up after informing you in my first letter, unless you give me a guarantee as per your prospectus state as to dividend."

Notices of the subsequent calls made by the directors were duly served on the defendant, who took no notice of them, and the directors in consequence filed this suit.

[651] *Latham* (Advocate-General) and *B. Tyabji*, for the plaintiffs.—The defendant is bound under s. 45 in one or both of two ways: first, as subscriber of the memorandum of association; or second, as a person who has agreed to become a member of the company. As to the first point, there is no doubt that if the copy which the defendant signed had been registered he would have been bound—s. 11 of the Indian Companies Act VI of 1882. The defendant's signature is attested by one Thomas Sugden, who is dead. He has attested merely by writing his initials. We submit that is a sufficient attestation. The Act does not say how attestation is to be made. The writing of initials is a sufficient attestation to wills—*Williams on Executors* (8th ed.), p. 95, note; *In the goods of Christian* (1). As to signing a copy of the memorandum, see *Lindley on Companies* (4th ed.), Vol. I, p. 170; *Buckley on Companies* (5th ed.), p. 45; *New Brunswick and Canada Company v. Boore* (2); *Smyth's Case* (3); *Anandji Visram's Case* (4).

Secondly, we say that if the defendant is not bound by his signature of a copy of the memorandum of association, he is, at all events, bound as having agreed to become a member of the company. His signature to the copy of the memorandum amounted to a proposal to take shares—*Anandji Visram v. The Nariad S. & W. Company* (4). In that view the document did not need registration. That proposal was not withdrawn until after the company had been registered, i.e., until after the proposal had been accepted, and it was then too late to withdraw it. It may be objected that there could be no proposal to a company not yet in existence. We contend, however, that the defendant's proposal was, until withdrawn, a continuing proposal; and it had not been withdrawn on the 3rd August, on which day the company was duly registered. Having on that day come into existence, the company accepted the defendant's proposal and allotted him shares. The remarks of Westropp, C.J., in *Anandji Visram's Case* (4) must be taken in connection with the facts of [652] that case. There the signature had been withdrawn before the company was registered. The notice of the 3rd August was a formal acceptance of the defendant's proposal. Counsel cited *Spiller v. Paris Skating Rink Company* (5); *Lawrence's Case*; *Kincaid's Case* (6).

(1) 2 Robert 110=7 Notes of Cas. 265.

(3) Irish Rep. 2 Eq. 573.

(5) L.R. 7 Ch. Div. 368.

(2) 3 H. & N. 249.

(4) 1 B. 320.

(6) L.R. 2 Ch. Ap. 412.

*Inverarity*, for the defendant.—On the evidence here it is clear the defendant never became a member of the company. The question arises on s. 45 (1) of the Indian Companies Act. As to the first point, it has been decided that the signed memorandum in order to be binding must be registered—*The Guzerat S. & W. Company v. Girdharlal Dalpatram* (2). That case is binding. In that case (see p. 427) the differences between the signed memorandum and the registered memorandum were trifling; in the present case they are numerous and important. The Christian names of the signatories are different, and the number of shares for which they sign is not the same. Also the dates on which the subscribers are said to have subscribed differ. We contend that signing a copy does not create membership, but here the document signed is not even a true copy.

Secondly, we say there was no agreement by the defendant with the company to become a member. There could not have been any such agreement, for by cl. 80 of the Articles of Association four directors were to manage the affairs of the company unless and until, under cl. 99, a less number should be appointed a quorum. In spite of this provision only three directors carried on the business. Anything they did was, therefore, invalid—*Lindley on Partnership* (4th ed.) p. 244. Even if the letter of the 3rd August, 1886, to the defendant was an allotment [653] (which it was not) and an acceptance of a proposal made by the defendant, it was not an allotment or acceptance which could bind the defendant. There was, in fact, at that time no board of directors which could accept the defendant's proposal if he had made one. Assuming that he did so, he withdrew it on the 5th August, when there was no one who could accept it on behalf of the company—*Howard's Case* (3).

Next we say that the defendant's subscribing a memorandum of association which was not registered is not a proposal to become a member of a company afterwards formed and registered. There was then no *persona* to whom the proposal could be made. The signed document could only amount to an agreement between the signatories to take shares in the company if the company should be formed, but the company cannot take advantage of that agreement. A contract with A before its registration cannot become a contract with B after and by reason of its registration. Any of the signatories might perhaps sue for damages in case of a breach of that agreement by any other signatory. Each signatory in effect agrees to take the number of shares he subscribes for, if all the others take the shares for which they subscribe. He agrees to become a member of a company of which the others are members. If any of them fail, none of the others are bound. In this case the defendant subscribed the memorandum on the 13th April, 1886. He withdrew his signature on the 5th August, but at that time several of the other signatories had already withdrawn. He, therefore, was no longer bound and had a right to withdraw. He cannot be said to have acquiesced in their withdrawal, for he had no notice or knowledge of it. The memorandum which the defendant signed differs in several respects

(1) Act VI of 1882, "Section 45.—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 with a company under this Act to become a member of such company, and whose name is entered on the register of members, shall be deemed to be a member of the company."

(2) 5 B. 425.

(3) L.R. 1 Ch. 561.

1888  
MAY 2.  
—  
ORIGINAL  
CIVIL.  
12 B 647.

1888

MAY 2.

from the memorandum registered, *e.g.*, in the dates of subscription and even in the names of the subscribers.

ORIGINAL  
CIVIL.

12 B 647.

It is contended that the letter of the 3rd August was an acceptance of a proposal made by the defendant. It was nothing of the kind. It was merely a demand for Rs. 10 payable [654] on application for shares under cl. 31 of the articles of association. That letter treats the defendant as not yet qualified to get the shares, as he had not paid the sum required. He was then evidently regarded as only an applicant and, as yet, an unqualified applicant. The letter is, therefore, not a final acceptance of a proposal.

### JUDGMENT.

SCOTT, J.—This case turns upon the construction of s. 45 of the Indian Companies Act VI of 1882. Mr. Lamb, on the 13th April, 1886, signed a printed copy of the proposed memorandum of association of a projected company, which on the 3rd August, 1886, was registered as the "Imperial Flour Mills Company." On the same date, *viz.*, the 3rd August, Mr. Lamb received a notice from the secretary of the company notifying that the company had been duly registered, and requesting him to pay the sum of Rs. 100, "being deposit of Rs. 10 per share on shares subscribed by you." On the 5th August Mr. Lamb replied to the secretary—"Yours to hand this morning. As my terms of agreement expire in the course of a few months, and not knowing whether I shall stay in the country, I have decided not to take up the shares for the present." To this the secretary rejoined next day—"You have legally become a shareholder of the company when you have signed the articles and memorandum of association, and since the company is registered, you cannot now withdraw your shares. On the 4th September the secretary again wrote pressing for the payment of the Rs. 100. To this Mr. Lamb does not seem to have replied. On the 25th September the directors held their first meeting, and resolved that the "shares applied for be allotted, and application and allotment moneys be called in." On the 1st October the secretary notified to Mr. Lamb the allotment of ten shares, and requested him to pay the overdue deposit call of Rs. 10 per share and the allotment call of Rs. 15 per share. To this Mr. Lamb replied somewhat tardily on the 11th November:—Long before any allotment was made, I told you I should not take up the shares in my name; you may take what steps you like." Mr. Lamb evidently thought that his repudiation of the shares on the 5th August freed him from all liability to the company.

[655] The question turns entirely upon the interpretation of the section I have already mentioned, *viz.*, s. 45 of Companies Act VI of 1882, which defines the persons who are to be considered to be members of a company. There are two methods by which a person can become a member: (a) by signing the memorandum of association, (b) by agreeing to take shares. As regards the first point, I am relieved of the labour of investigation by a decision of this Court. In *The Guzerat S. & W. Company v. Girdharlal Dalpatram* (1) Westropp, C.J., and Melvill, J., decided that the memorandum to be signed under the corresponding section of the earlier Companies Act must be the registered memorandum of association. This decision was a confirmation of an earlier decision on this point in *Anandji Visram v. The Nariad S. & W. Company, Limited* (2). The question was

(1) 5 B. 425.

(2) 1 B. 320 (328).

raised before the late Chief Justice, whether the signing of a true copy of the registered memorandum was not equivalent to signing the registered memorandum itself. The Court did not favour the contention, but gave no express decision on the point, as the document signed by the defendant in that case materially differed from the registered memorandum. Similarly, in the present case, what was set up yesterday as a duplicate or exact copy was proved to differ materially. The signatories were not the same in one instance; the shares subscribed for were not the same in another instance; one signatory was omitted altogether; the dates of subscription were not the same in many instances, and, in short, in my opinion the document was not a copy at all.

Now I come to the second point. The exact words of the section are important: "Every other person, who has agreed with a Company under this Act to become a member of such Company, and whose name is entered on the register of members, shall be deemed to be a member of the Company." In the case I have already referred to, the late Chief Justice lays it down that "the agreement which is to bind a party must be an agreement with the company itself." Mr. Lamb's signature on the 13th April, 1886, therefore, can, at the most, only be an *application* for shares to the promoters, which became by the [656] fact of there being no withdrawal before the registration, an application to the company on the 3rd August. There could be no acceptance of this application until the company was registered on the 3rd August. Was this application accepted before or after the 5th August, when Mr. Lamb wrote that he did not want the shares at all? Now it is clear on the decisions that in ordinary cases of an application for shares there is no agreement in the absence of allotment and notice of it to the applicant: see Lindley on Partnership (4th ed.), p. 100 and p. 1372; Buckley on Companies (5th ed.), p. 54; *Pellatt's Case* (1). In the present case, withdrawal undoubtedly preceded allotment. "But," says Mr. Lindley, p. 104 (4th ed.) "acceptance may be evidenced otherwise than by an actual allotment." Although the withdrawal in this case, preceded the allotment, I have, therefore, still the question of acceptance to examine. It was argued that the notification for registration on the 3rd August, coupled with the demand for the payment of the usual deposit, was equivalent to acceptance. The definition of what amounts to an "acceptance of shares" is to be found in art. 8 of the company's own articles. It is as follows:—"An application signed by or on behalf of the applicant for shares in the company followed by an allotment of any shares therein shall be an acceptance of shares within the meaning of these articles; and every person who thus otherwise accept any shares and whose name is on the register shall for the purpose of these articles be a shareholder." Has Mr. Lamb otherwise accepted the shares? Are there such special circumstances in this case as to prove a binding agreement before allotment? The only special circumstance is the letter of the 3rd August. That letter was written not by order of the directors at a meeting duly convened and composed of the proper quorum of four. It was written by the secretary after consulting separately three only of the directors, and what passed was given in evidence here by the secretary himself. "In the case of each of three directors," the secretary says, "I told him the company was now registered with the consent of all the directors, and I asked if I should send

1888

MAY 2.

ORIGINAL  
CIVIL.

12 B. 647.

(1) L.R. 2 Ch. 527.

1888  
MAY 2.  
ORIGINAL  
CIVIL.  
12 B. 647.

a letter to all who had signed the memorandum of association for [657] the Rs. 10 deposit call, and he agreed." This was clearly an irregular proceeding which would not bind the company or its subscribers in such an important matter as the application for and acceptance of shares—*Howard's Case* (1). The directors did not act as a board, nor was the consent of a quorum obtained.

But it is not necessary to rest my decision on the irregularity and want of authority. The consent was not obtained to any application for shares, nor was there any acceptance of any particular offer to take shares. The letter itself does not amount to more than a request for the deposit on the shares applied for. That deposit is usually made before or at the time when the application is sent to the directors. But in this case there was no actual application—only a signature which became an application when the company was registered. So that the deposit had to be called in by the company. But it was only the ordinary deposit money required as a guarantee of the *bona fides* of an application for shares. The resolution of the Board, which is contained in the minutes of the meeting of the 25th September, puts the real meaning of the letter of the 3rd August beyond all doubt. The resolution is as follows:—Resolved that the shares *applied for* be allotted and *application* and allotment moneys be called in." It is quite clear that up to that date Mr. Lamb's application had not been made a binding agreement by acceptance. This repudiation, therefore, of the 5th August was in time, and he cannot be held liable as a shareholder of the company. The company must pay the costs, including the costs of the application for a re-hearing.

Attorneys for the plaintiffs:—Messrs. *Bomanji and Hormasji*.

Attorneys for the defendant:—Messrs. *Macfarlane, Edgelow, and Hemming*.

12 B. 658.

[658] ORIGINAL CIVIL.

Before Mr. Justice Farran.

HAJI FAKIR MAHOMED (*Plaintiff*) v. SHAIK ABDULLA  
(*Defendant*).<sup>\*</sup> [24th June, 1887.]

*Specific performance—Suit by vendee against vendor—Delay of vendee in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice.*

On the 26th February, 1886, the defendant purchased a house from C. for Rs. 4,500 and paid C. a considerable portion of the purchase-money. Before the transaction was completed, and the conveyance executed, the defendant, on the 23rd June, 1886, by an agreement in writing, of that date, agreed to sell the house to the plaintiff at an advanced price of Rs. 4,800. The defendant was anxious that the sale should be completed in a short time, as the draft of the conveyance by C. to himself had been prepared, though not finally approved, and the house was in bad repair and in a somewhat dangerous condition. He had applied to the Municipality for leave to repair the house, and the monsoon season had begun. Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase within twelve days from the date of the agreement.

<sup>\*</sup> Suit No. 9 of 1887.

(1) L. R. 1 Ch. 561.