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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

THE IMPERIAL ICE MANUFACTURING COMPANY, LIMITED (*Plaintiffs*) *v.* MUNCHERSHAW BARJORJI WADIA (*Defendant*).*
[3rd May, 1889.]

Indian Companies Act VI of 1882, *s.* 45—*Contract with the company—Signing duplicate of the subsequently registered memorandum—Subsequent allotment and repudiation—Specific Relief Act I of* 1877, *s.* 23, *cl.* (*h*), *and s.* 27 *cl* (*e*).

The defendant, in February 1886, signed duplicates of the documents subsequently registered as the memorandum and articles of association of the plaintiff company in December of the same year. By the documents which he signed, he "agreed" to take the number of shares (ten) set opposite his name. He never cancelled that agreement. Ten shares were subsequently allotted to him; but the defendant did nothing amounting to an acceptance of this allotment, and on the 19th April, 1888, definitely cancelled his previous agreement to take shares.

Held, that the defendant had never become a shareholder of the company. Whatever the signing by the defendant of the documents in February, 1886, amounted—whether to a contract, or to a mere proposal—the defendant in signing [416] them addressed, not the company, which was not then in existence but the promoters. If a contract, the company was not then in existence, and could not, therefore, ratify it: if a proposal, it was not a proposal to the company, or an agent for the company and the company, could not, therefore, accept it.

Section 23, cl. (*h*), and s. 27. cl. (*e*), of the Specific Relief Act I of 1877 do not apply to contracts to take shares; and only embody the English law as to cases where a company has taken the benefit of a contract, but refuses to carry it into effect.

REFERENCE from the Court of Small Causes:—

The facts of the case are sufficiently set out in the following case stated for the opinion of the High Court by W. E. Hart, Chief Judge of the Court of Small Causes:—

"1. This is a suit to recover Rs. 1085—6, as the amount of two unpaid calls with interest, said to be due from the defendant as a registered holder of ten shares in the capital of the plaintiff company.

"2. His name appears at p. 332 of the register of share-holders as the holder 'by allotment' of the shares numbered from 232 to 241 registered in March, 1887, the date being left blank.

"3. Some time in February, 1886, the defendant signed a clause at the end of a printed document purporting to be the proposed memorandum of association of a company then intended to be formed, whereby he 'agreed' to take the number of shares (ten) set opposite his name.

"4. At the same time he also signed a printed document purporting to be the articles of association of the intended company. These two documents together formed Ex. (B) in the case.

"5. The company was not registered until December, 1886, and then it was not the documents so signed by the defendant that were registered as its memorandum and articles of association, but others of which those signed by the defendant were said to be a duplicate, or copy.

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* Small Cause Court Suit No. $\frac{94}{}$ of 1888.

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"6. It was not contended that there was any material variance between the two sets of documents in their terms or conditions, and I found, on the evidence, that the defendant had not intimated to the plaintiffs, or the promoters of the company, **[417]** before 19th April, 1888, that he had cancelled his agreement to take the shares.

"7. On the question as to the defendant's position in regard to the plaintiffs by reason of that agreement remaining uncancelled, it was admitted that the signature of the unregistered copy of the memorandum and articles not being equivalent to signature of the registered copy (see *per* Westropp, C. J, in the *The Guzerat Spinning and Weaving Company* v. *Girdharlal Dalpatram* (1), it could not be treated as an agreement with the company binding on the defendant under the former part of s. 45 (2) of the Indian Companies Act VI of 1882.

"8. But it was suggested that the defendant's agreement to take shares, being communicated to the plaintiffs after the formation of the company, became his proposal to them; and that when they accepted it, and intimated such acceptance to him, it became an agreement with the company binding on the defendant under the latter portion of s. 45 of the Indian Companies Act VI of 1882.

"9. A great part of the defence turned on the validity of the alleged acceptance by the plaintiffs and its communication to the defendant. But into that I did not go in deciding the case, as I was of opinion that the proposal came, not from the defendant, but from the plaintiffs, and that as they failed to prove its acceptance by him, they failed to establish their claim.

"10. My reasons for such opinion are set forth in the annexed extract from my judgment, in which are also contained such further findings of fact as are necessary to the decision of the point.

"11. The suit being for a sum exceeding Rs. 500, I have, at the request of the plaintiffs' counsel, stated the case for the **[418]** opinion of the High Court on the question of law, whether my view as to the effect of the defendant's agreement in February 1886 is correct. If the answer to that question is in the affirmative, my present decision will stand. If the answer be in the negative, my order dimissing the suit with costs must be set aside, and I apprehend I must proceed to decide the case on the points raised in the defence."

Extract from the judgment referred to:—

"It seems to me that the signature of Ex. (B) by the defendant constituted, not a mere offer or proposal to be communicated to some one else for acceptance, but a complete agreement with the promoter to take shares in his company when he should have formed it. Such an agreement under the late Indian Companies Act X of 1866. s. 22, or under s. 23 of the English Companies' Act, 1862, might possibly be argued to be capable of becoming an agreement with the company when formed, for the words there are: 'every person who has agreed' (not

(1) 5 B. 425.

(2) Indian Companies Act VI of 1882, s. 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."

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specifying with whom) '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.' But this construction evidently did not recommend itself to the mind of the late Chief Justice in deciding the *The Guzerat Spinning and Weaving Company* v. *Girdharlal Dalpatram*(1). The matter now, however, is beyond a doubt; for there is a material and significant difference in the wording of the present Indian Companies Act VI of 1882. s. 45 of which says: 'every person who has agreed *with a Company* under this Act' (that is, with a company after it has been formed, registered and commenced its existence as a company under the provisions of the Indian Companies Act, 1882), 'to become member,' &c. How a complete agreement with one person is to be converted into an agreement with another, or modified into a proposal for an agreement with another, I confess, I cannot see; still less can I understand how a man is to agree 'with a Company under this Act' on the basis of a proposal made to another, at a time when, under the Act, the company could have no existence. **[419]** Nor do I think the promoter can be regarded as the agent of the defendant authorized to convey his proposal to the company, somewhat in the way that a broker for sale or purchase might be said to be; first, because that is not the form of the agreement with him, as evidenced by Ex. (B) and, secondly, because when Ex. (B) was signed, neither company nor shares were in existence. Nor do I see why the Court should trouble itself to be astute in elaborating ingenious and complicated theories in favour of the plaintiffs, in regard to substituted agreements, continuing proposals, and the like, under the latter portion of s. 45 of the Indian Companies Act, when the plaintiffs had, under the former portion of that section, a very simple means themselves to bind the defendant by his agreement with the promoter by registering that copy of the memorandum and articles he signed, but chose not to avail themselves of it.

"To my mind the simplest and most logical view to take of such a transaction as the present is this. The defendant by signing Ex. (B) entered into a complete agreement with the promoter to take shares in the company when formed; assuming, of course, that they would be allotted to him by the directors; such agreement, had that document been registered as the memorandum and articles of the company, would have become, by virtue of the former portion of s. 45 of the Indian Companies Act, an agreement with the company, and they might then have sued upon it. But inasmuch as it was not so registered, it remained an agreement with the promoter, and cannot be regarded even as a proposal to the company, capable of being converted by their mere acceptance into an agreement with them. When communicated to the company by the promoter, it is, in regard to them, simply a piece of information of the defendant's willingness to become a holder of ten shares. If the company thereupon proceed to allot him the shares, the proposal, in fact, comes from them. They will then have to show that it was communicated to the defendant and accepted by him.

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"The most that can be said, I think, is that the defendant's agreement with the promoter is to be regarded as an authority **[420]** to the latter to convey the proposal involved in it to the company when formed. But to hold this would be to import into the agreement a term which it

(1) 5 B. 425.

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does not contain, and not necessary to it. There is in it no suggestion of an authority to the promoter to do anything. It is simply an agreement that the defendant will take a certain number of shares. To do this, it is not necessary that the promoter should convey the proposal to the company when formed, or that he should have the defendant's authority to do so; for the proposal might equally well come from the defendant himself. If it does not, the consequence, no doubt, may be that the defendant is guilty of a breach of his agreement with the promoter. But for that he would be liable to the promoter, not to the company. It might be argued that it must have been the intention of the parties to the agreement in February, 1886, that the promoter should communicate the defendant's proposal to the company when formed; inasmuch as that seems the simplest and most natural course. But to this the answer is much the same as before. If that was the intention it was easy to express it. That course is not the only or necessary one. We ought not, on a mere speculation as to supposed unexpressed intention of the parties, to introduce an additional term into their agreement which they did not themselves see fit to insert.

"I know of no case in which it has been held that the signature before the formation of a company of an agreement to take shares at the foot of an unregistered copy of the intended memorandum and articles of association is a proposal to the company to take shares.

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"Finding as a fact that the defendant's agreement to take ten shares in the plaintiffs' company, when formed, was a complete agreement with the promoter, and finding no evidence of any authority from the defendant to the promoter to communicate this agreement to the company, when formed, as a proposal to them, I hold that it can no more be held a continuing proposal to, than a concluded agreement with, the company, on the simple ground that I find nothing in this case to take it out of the clear rule of law, that a mere agreement with one person cannot be [421] afterwards taken advantage of by another who was not then so much as in existence; and I decline to be the first to give effect to a theory new to me the effect of which seems to be to introduce a curious modification into, if it does not entirely revolutionize, what I conceive to be settled law. This being so, the plaintiffs' intimation to the defendant, that they had allotted him shares, which it is said they gave by several letters, must be regarded as a proposal from them that he should become a shareholder. The burden will then lie on the plaintiffs of proving that this proposal was accepted by the defendant."

The learned First Judge then considered the evidence bearing on this point and found that there had been no acceptance, in fact, by the defendant of such proposal.

Russell, for the plaintiffs.—The memorandum signed by the defendant stated, "we are desirous of being formed into a company in pursuance of the memorandum, and we respectively agree to take the shares set forth in our names." Signing this was equivalent to a continuing offer or authority to the promoters to communicate it to the company, which was done and the company afterwards accepted it—Lindley on Partnership, (4th ed.), Vol. I, p. 128. This is sufficient to satisfy s. 45 of the Companies Act. He cited *In re Bowron, Baily & Co., Ex parte Baily* (1), *In re Brampton and Longtown Railway Company*; *Shaw's Claim* (2) *Cookney's*

(1) L. R. 3 Ch. Ap., 592. (2) L. R. 10 Ch. Ap. 177.

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Case (1). But even if the transaction be looked at as a mere ratification, by the company, of a contract made with the promoters, that may not be possible in England, but it is so in India—Specific Relief Act I of 1877, s. 23, cl. (*h*), s. 27, cl. (*e*).

Jardine, for defendant.—The decision in the *The Guzerat Spinning and Weaving Company* v. *Girdharlal Dalpatram* (2), followed as it was by the addition of the words "with the Company." to s. 45 of the Companies Act in 1882, makes the plaintiffs' argument untenable. The Specific Relief Act makes no alteration in this respect in the law from that which obtains in England. The sections cited do not apply to the case of a contract to take shares.

JUDGMENT.

[422] *3rd May*, 1889. The judgment of the appeal Court was delivered by

SCOTT, J.—This is a reference from the Chief Judge of the Small Cause Court, arising out of a suit to recover Rs. 1,085-6, as the amount of two unpaid calls said to be due from the defendant as the registered holder of ten shares in the capital of the plaintiffs' company. It appears that the defendant in February, 1886, signed duplicates of the documents subsequently registered as the memorandum and articles of association when the company was registered in December of the same year. By the duplicate of the memorandum of association which he signed, he "agreed" to take the number of shares (ten) set opposite his name. He never cancelled that agreement. On the authority of the *The Guzerat Spinning and Weaving Company* v. *Girdharlal Dalpatram*(2) it was admitted that the defendant's signature to such a document did not constitute him a member of the company under the former part of s. 45 of the Indian Companies Act. But it was argued that the defendant's agreement with the promoters became on the registration of the company a proposal to the company to take shares which the company accepted by allotment. The only authority cited in favour of this view of the case was a remark made by the Court in the *The Imperial Flour Mills Company, Limited* v. *W. T. Lamb*(3), which was not necessary to the decision, and was only to the effect that even if such an agreement with the promoters could become equivalent to an application to the company, it had been withdrawn before acceptance by allotment. However, a consideration of the authorities—*In re Empress Engineering Company* (4); *Melhado* v. *Porto Algre Railway Co.* (5); *Kelner* v. *Baxter* (6); *Scott* v. *Lord Ebury*(7)—shows that such a view of the case is inconsistent with the principle there laid down, and which may be stated in the following terms:—"There cannot be an effective ratification of a contract by a person or a company not in existence at the time such contract was made." In the present case there was only a contract with the promoters. It has been decided that a promoter is not an [423] agent for a company before its formation—*Lydney and Wigpool Iron Ore Company* v. *Bird* (8), and this contract did not, therefore, bind the company and could not be held to be made on their behalf. Nor could it be ratified by the company, as the company was not in existence when it was made. I do not think the principle is altered by calling it an

(1) 3 De. G. & J. 170. (2) 5 B. 425. (3) 12 B. 647.
(4) L. R. 16 Ch. Div. 125. (5) L.R. 9 C. P. 503. (6) L.R. 2 C. P. 174.
(7) L. R. 2 C. P. 255. (8) L.R. 33 Ch. Div. 85 (91).

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application. Whatever it was, whether contract or offer to take shares, it was addressed to the promoters, and not to the company, and the company could not subsequently adopt it, as they were not in existence when it was made, and it was not renewed when the company was established. It was argued that, although ratification was not possible under English law, the Specific Relief Act (s. 23, cl. (*h*), and 27, cl. (*e*)) made it admissible. But these sections were not intended to apply to contracts to take shares, but only to contracts for the working purposes of the company such as would be, in the present case, a contract for the supply of machinery for making ice. They only crystallize the English law as to cases where the company has taken the benefit of a contract, but refuses to carry it into full effect:—see cases collected in Fry on Specific Performance, (2nd ed.) Part II, c. 5, and especially pl. 228 and 229. Moreover, if these sections of the Specific Relief Act had been made to cover contracts regarding shares with promoters, s. 45 of the Companies Act, which is a more recent enactment, could not have been framed in its present language. As the section stands, it could not be taken to include a contract made with the promoters. The addition of the words "with a Company" in the Act of 1882 shows clearly that such contracts were not within the intention of the Legislature, nor are they within the plain meaning of the words. We are of opinion, therefore, that the view taken by the Judge as to the effect of the defendant's agreement in February, 1886, is correct, and that he rightly disposed of the case by his order dismissing the suit with costs. The plaintiff must pay the costs of this reference.

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

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

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13 B. 424.

[424] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

SAYAD NYAMTULA (*Original Plaintiff*), *Appellant v.* NANA VALAD FARIDSHA (*Original Defendant*), *Respondent.**
[17th July, 1888.]

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), *ss.* 39, 46, 47, 48—*Village conciliator—Proceedings before a conciliator—Certificate of a conciliator—Exclusion of the time occupied in proceedings before a conciliator in computing the period of limitation—Limitation—Limitation Act* (*XV of* 1877), *art.* 144—*Adverse possession*—Onus probandi—*Practice—Objection to the jurisdiction of a Court taken for the first time in second appeal.*

Under s. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the conciliator to whom application is to be made for an amicable settlement of a dispute must be the one appointed for the local area in which the agriculturist is residing, and not for the district in which the land in dispute is situated.

The plaintiff was an agriculturist residing in the Kopargaon Taluka. He purchased the house in dispute from the defendant on the 30th January, 1872, but did not get possession.

On the 12th December, 1883, the plaintiff applied to be put into possession under s. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the

* Second Appeal, No. 311 of 1886.