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PRIVY COUNCIL.

BOMBAY BURMAH TRADING CORPORATION, LIMITED (DEFENDANT), APPELLANT, AND FREDERICK YORKE SMITH (PLAINTIFF), RESPONDENT.

P. C.*
1894.
June 19
and 20.

On appeal from the High Court at Bombay.

Company—Preferential dividend payable to holder of one set of shares—Contract—Construction—Construction of contract by the company to pay it to the shareholder and to his executor holding the same—Death of the shareholder—"Holder" of shares—Legal title to shares—Meaning of the word "hold"—Administration.

The goodwill of a business which a merchant had carried on, and the capital, property, and assets with it, were transferred by him in 1864 to a joint stock limited company, who agreed with him that in consideration of the transfer by him of property referred to in the contract as "the fixed assets," one hundred paid up shares of Rs. 2,500 each, of which any assignment by him during the next five years from the registration of the company should not be recognized by them as valid, should be allotted to him. It was also agreed that, in consideration of the transfer, he and his executors or administrators shall be entitled, so long as they hold the said hundred shares, to an extra or preferential dividend."

On this agreement the parties acted, and the shareholder held the shares till he died in England in 1888, having by will directed that his executors or administrators should hold the hundred shares in trust for his surviving brothers of whom the executor who proved the will was one. Administration with the will annexed was granted in India to the plaintiff in this suit as the attorney of the executor. A note of this was made in the register of the company, leaving the hundred shares still in the name of the testator. The company then discontinued to pay the preferential dividend, and now contended that it was no longer payable inasmuch as the testator's estate had been administered, and that the executor no longer held the shares as executor but as trustee for the beneficiaries under the will.

Held, that the contract was still in operation, the executor still "holding" the shares within its meaning; and that the preferential dividend continued payable to the estate of the testator, the company being only concerned with the legal title to the shares, and not with any claims, if there were any, that might be made by beneficiaries under the will against the executor as trustee.

Present :—Lords HOBHOUSE, MACNAGHTEN and MORRIS, and Sir R. COUCH.

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APPEAL from a decree (5th December, 1892) of the appellate High Court, affirming in all essential points a decree (11th March, 1892) of the Court in its original jurisdiction.

This appeal related to the construction of the provisions of a contract, made on the 22nd July, 1864, between William Wallace, a merchant till then carrying on a trade in timber at Rangoon, and a joint stock company incorporated in 1863 under Act XIX of 1857 for the purpose of taking over from him the goodwill, property, capital and assets of his business. The contract, among other provisions, provided in clause 13 that so long as William Wallace, his executors and administrators, should hold one hundred fully paid up shares, allotted to him in consideration of the transfer of property, referred to as "the fixed assets," the company would pay to him, or them, an extra or preferential dividend upon those shares. This dividend was to be equal to one-third of surplus profits calculated in the manner specified in the contract, and subject to certain deductions.

The question now was whether this preferential dividend was still payable to the estate of William Wallace, who died in England in 1888. The appellant company was incorporated in Bombay in 1863 originally under the name of the "Burmah Trading Company," having a nominal capital of Rs. 25 lakhs divided into 1,000 shares of Rs. 2,500 each, afterwards increased by additional shares of the nominal value of 12½ lakhs. The firm of Wallace & Co., of Bombay, where the head office was, were their secretaries, that firm having acted previously^s as the agents of William Wallace whose business had been established in Rangoon. The "fixed assets" were immoveable property, valued at about Rs. 2,76,000. There were, besides, contracts and operations undertaken, forest rights and concessions obtained, which were transferred to the company.

The respondent (plaintiff) represented in India the executor of the will of William Wallace who died in England on the 28th January, 1888. Administration with the will annexed, was granted in Bombay to Frederick Yorke Smith (plaintiff) as the attorney of the executor, limited as the Act provides, on the 27th September, 1888.

The testator appointed his three brothers to be his executors, referred to the preferential dividend on the hundred shares, and directed that his executors, or administrators, should hold these shares upon trust so that the same should be at the absolute disposal of such of his three brothers as should survive him, if more than one, as joint tenants. One of the brothers died in the testator's lifetime. One only proved the will as executor. Whatever is material to this report in the agreement of the 22nd July, 1864, in the memorandum and articles of association of the appellant company and in the will of 1880, has already been set forth, as well as the facts of the case, in the report (under the above name ⁽¹⁾) of the proceedings in the Courts below. The facts are also stated in the judgments, which are reported at length at pp. 209 and 219 of the I. L. R., 17 Bom., of Farran, J., in the original jurisdiction and of the Chief Justice, in the appellate.

The first Court held that the executor of W. Wallace, or his attorney, was still the registered holder of the shares. The term "shareholder" in the agreement, and throughout the memorandum and articles of association, which must be read with, and in explanation of, the agreement, had the fixed meaning of "registered holder." The judgment was that the contract was still in operation as to the preferential dividend, which was payable to the plaintiff as administrator so long as the executor of William Wallace should be the registered holder of the hundred shares (p. 209).

The appellate Court affirmed this judgment. As to what was meant by the executors and administrators "holding" the shares, the agreement of 1864 was to be read in connection with the provisions in the articles of association as to the transmission of shares, in sections 29, 30 and 31. They showed that the executors and administrators, although not formally on the register, were the only persons whose title could be recognized by the company. It was not advisable to express an opinion as to the construction of the words "executors and administrators" in the agreement, and the decree was varied in this respect (p. 219).

On this appeal,

(1) I. L. R., 17 Bom., 197.

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Mr. M. Crackanthorpe, Q.C., Mr. H. Burton Buckley, and Mr. M. I. Joyce, for the appellant company, argued that the estate to which the Courts below had adjudged the continuance of the payment of the preferential dividend, was no longer entitled to receive it. The executor having administered, and also assented to the bequest of the shares, remained entitled to them as trustee for the beneficiaries under the will, but no longer held them as executor within the meaning of section 13 of the agreement of 1864. He had ceased to "hold" them in that character, but held them as trustee. As to an executor becoming a trustee forthwith upon assenting to a specific bequest given to him in trust, *Dix v. Burford*⁽¹⁾ was cited. The preferential dividend could only be payable, after the death of the testator, so long as the executor held the hundred shares in his character of representative of the estate. He would cease to be in that character on commencing to hold them, either in his own right, or as trustee for others. The liabilities of the estate, on the facts, had all been provided for, and the specific bequest had been assented to. These shares, therefore, were held by the executor only as trustee. Further, it appeared that the sole reason why the shares had not been divided between the legatees "of the absolute interest in them, and all rights attaching to them," was that the latter, both of whom had been named executors, though only one had proved the will, desired to give effect to the wishes of the testator expressed to them before his death. But the executor could not, with reference to the use of the word in clause 13 of the agreement of 1864, remain permanently in that character, when he had discharged his functions. Had it been that he could so remain, then nothing would be required but a resort to suitable provisions, to enable testator and his successors to entitle themselves in perpetuity to the preferential dividend. It was submitted that the word "hold," in the agreement of 1864, meant "hold with a beneficial title." As to shares remaining in a testator's name in the books of a company, *Turquand v. Kirby*⁽²⁾ was cited. Williams on Executors, Vol. II, Part III, Bk. III, Ch. IV, and Buckley on the Companies Acts were referred to in regard to the position of the executor.

(1) 19 Beavan, 409.

(2) L. R., 4 Eq. 123.

Sir *Richard Webster*, Q.C., Mr. *Cozens-Hardy*, Q.C., and Mr. *T. J. Methold*, for the respondent, were not called upon.

Their Lordships' judgment was thereupon delivered by

LORD MACNAGHTEN:—This appeal raises a question as to the meaning and effect of a provision contained in an agreement of purchase and sale which was made between the appellants and the late Mr. William Wallace in 1864. The question relates to the continuance of a special or extra dividend attached to certain shares, part of the consideration for the purchase.

Mr. Wallace was the possessor of an extensive and valuable business as a timber merchant in Burmah. In 1863, under the Limited Liability Act then in force in Bombay (Act XIX of 1857), a joint stock company, which is now called The Bombay Burmah Trading Corporation, Limited, was formed for the purpose of taking over Mr. Wallace's business. The company was registered with a nominal capital of 25 lakhs, divided into 1,000 shares of 2,500 rupees each.

The company's articles of association, printed in the Record, contain two regulations which it will be convenient to notice in passing. Article 9 gives the company a lien on all the shares of every shareholder for all the debts, liabilities, and engagements of such shareholders. Article 29 provides, in common form, that the executors and administrators of a deceased shareholder shall be the only persons recognised by the company as having any title to his shares, but it requires, as a condition precedent to recognition, the production of probate or letters of administration granted by the High Court of Bombay. It was suggested, in the course of the argument before this Board, that article 9 was not in existence when the purchase agreement was made. That objection comes rather late. In the Courts below the case was argued on the footing that the articles printed in the Record were the relevant articles of the company. Nor indeed is the objection one of substance. It was part of the arrangement expressed in the agreement itself that the company should alter or modify their existing articles as they might be advised for the purpose of carrying out the agreement. It matters little whether the article in question was introduced for the very purpose of

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the agreement or contained in the articles of association as originally framed.

The terms and conditions of the transfer of the business to the company are to be found in an agreement dated the 22nd July, 1864, which was ratified and adopted by the company in general meeting and carried into effect. The agreement is expressed to be made by Mr. Wallace of the first part, and five gentlemen, directors of the company, of the second part. Mr. Wallace, it seems, had concessions from the British Government, he had concessions from the King of Burmah, he had forest rights, saw mills, a large establishment and staff of workmen, ships under charter, and a number of pending contracts. The agreement was made on the faith of certain representations by Mr. Wallace as to the value of his business, and the nature and circumstances of the property which he proposed to hand over. After setting out these representations somewhat in detail the agreement proceeds as follows:—"And whereas the said parties hereto of the second part have made such enquiries as were in their power with regard to the said representations, and so far as such enquiries extended, the said representations appeared to be correct; but as to many of the matters about which the said representations were concerned the said parties hereto of the second part have been obliged to rely on such representations alone, it being of great consequence for the interests as well of the said company as of the said William Wallace that some binding arrangement should be made with the least possible delay. And whereas it was considered by the said parties hereto that having regard to the great difficulty of estimating the value of the said forest operations, rights and grants of the said William Wallace and of the said trained establishment and goodwill, the interests as well of the company as of the said William Wallace would be best consulted by entering into the arrangement hereinafter in clause 13 contained." Then clause 12 provided that in consideration of the transfer of certain property, referred to as "the fixed assets," Mr. Wallace, should be entitled to have allotted to him 100 shares in the company, of 2,500 rupees each, but at the same time it declared that the company should not be bound to give their consent to or recognise as valid any assignment of the

said 100 shares, or any of them, during a period of five years from the date of the registration of the company.

Clause 13, so far as material, is in these terms:—

“ In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred (other than the said fixed assets and other than the premises mentioned in the clauses six, seven and nine) ”—those premises consisted of timber already cut, live stock, stores and plant—“ the said William Wallace, his executors or administrators shall be entitled so long as he or they shall hold the said one hundred shares to an extra or preferential dividend equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of twelve per cent. per annum on the paid up amount of all shares in the company (including the said one hundred shares) and after setting apart from time to time out of such surplus profits as a reserved fund or to the credit of any reserved fund already created such sum as the directors of the company for the time being may in their discretion think fit.”

That is a provision, not unintelligible and not unreasonable, by which, as the agreement states on the face of it, the interests of the purchasers as well as the interests of Mr. Wallace were intended to be consulted. Mr. Wallace was to receive payment for the goodwill of his business out of future profits, and in proportion to the amount of those profits. He would be paid handsomely if his representations proved correct. If they turned out to be incorrect it would be an advantage to the company to keep Mr. Wallace's name on the register, and to keep within their reach the shares which represented the purchase-money. It must have been obvious to both parties to the agreement that it was not unlikely to lead to difficulties and complications which might last for an indefinite time. It was, therefore, of importance to the company to have Mr. Wallace as a member, and to keep their hold on Mr. Wallace's shares for as long a time as possible. They were not bound to allow a transfer of his shares for five years; after that period they trusted, it seems, to the influence and operation of the inducement held out in the shape of an extra

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dividend, leaving the duration of the arrangement to depend on the course of events.

Mr. Wallace is now dead. He died on the 28th of January, 1888. He left a will naming executors, two of whom survived him. His will has been proved in England by one of the executors. As the attorney of that executor, Mr. Smith, the plaintiff and respondent in this case, has obtained a grant of letters of administration, with the will annexed, from the High Court at Bombay. The letters of administration have been produced to the company, and they have recognised the title of the administrator by noting the letters of administration in the share register. The shares still stand in the name of Mr. Wallace; but it is not disputed, if it was not actually admitted, that all the testator's debts have been paid or satisfied.

The only question, if there be a question, is whether in these circumstances the extra dividend still continues to be payable. The appellants contend that the extra dividend is not payable now, because there is nobody who can be said to hold Mr. Wallace's shares. Mr. Wallace, they say, does not hold them, because he is dead; his executors do not hold them, because their names are not on the register. But then who does hold them? Certainly, no one else. And why are the shares not held by Mr. Wallace or his executors or administrators? There is no magic in the word "hold." Mr. Wallace's name is on the register. The company cannot remove it. As long as it is there the company are bound to credit the proper dividends to his holding, and to recognise the title of his legal personal representatives to receive any dividends which may be carried to his credit.

It was urged on behalf of the company that Mr. Wallace's estate ought to be wound up and distributed, and that some person ought to be put on the register in his own right; and they complain that, if the respondent's contention is correct, this extra dividend may go on for ever. The contention of the company is a singular one, and the complaint they make is no less singular. They complain that the attraction which they themselves held out is attractive still—only too attractive. They think it a hardship that the arrangement should continue when once it has

served their purpose. But it must be remembered that the scheme had a twofold object. It was designed for the protection of the company; it was also intended as a mode of payment for the goodwill. Why is the payment for goodwill to stop because Mr. Wallace's representations have proved correct and the provision is no longer needed for the protection of the company?

But, say the company, if the executors would only do their duty to their beneficiaries under the will, or if the beneficiaries would kindly insist on their rights, the arrangement would come to an end, because the estate would be distributed, and the shares would be appropriated to persons beneficially entitled. What have the appellants to do with that? Naturally the beneficiaries are content with things as they are. How can the company avail themselves of any equities which the beneficiaries may have as between themselves and their trustees? The company are only concerned with the legal title to the shares; the legal title is that of Mr. Wallace, deceased; and his legal personal representatives are entitled to whatever may be payable in respect of his shares.

Their Lordships think that according to the true meaning of clause 13, and the very letter of its terms, the shares in question are held by Mr. Wallace, or his executors or administrators. They will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellants:—Mr. *Edward F. Turner.*

Solicitors for the respondent:—Messrs. *Budd, Johnsons, and Jecks.*

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