APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Dixit.

THE EAST AND WEST INSURANCE CO., LTD. (ORIGINAL PLAINTIFF) APPELLANTS *v.* KAMLA JAYANTILAL MEHTA (ORIGINAL DEFENDANT) RESPONDENT* 1956 *Feb.* 13

Companies—Call—Essentials of a valid Call—Articles of Association requiring a Call to be made by a resolution of the Board of Directors—Essentials of a valid Resolution for Call—Whether Directors can delegate the power to make a Call—Construction of Articles.

A resolution of the Board of Directors of a company making a call must comply with the essential provisions of the articles of association in that behalf; otherwise the call is invalid.

The Newry & Enniskillen Railway Co. v. *Edmunds,*[1]; *The Great North of England Railway* v. *Diddulth,*[2], not followed.

Johnson v. *Lyttles' Iron Agency,*[3] *In re Cawley & Co.,*[4], *Pioneer Akali Works* v. *Amiruddin,*[5], *Bhagirath Spinning & Weaving Co.* v. *Balaji,*[6] followed.

Dhanraj v. *Wadia,*[7] considered.

The power to make a call is in the nature of a trust and it is to be exercised in the interests of the Company. A power of such importance vested by the articles of association in the directors cannot be delegated by them to any one else.

FIRST appeal against the decision of R. B. Mehta, Esquire, Judge, City Civil Court, Bombay.

Suit by a Company to recover from its shareholder the amount of call money with interest and costs.

The facts are fully set forth in the Judgment.

N. P. Engineer with *M. R. Mody* instructed by *Matubhai Jamietram & Madan* for the Appellants.

K. T. Desai with *K. K. Desai* instructed by *N. C. Dalal & Co.,* for the Respondent.

Chagla C. J.:—The defendant, who is the respondent before us, was at all material times a shareholder of the plaintiff company who are the appellants. The plaintiff company filed a suit, out of which this appeal arises, to recover from the defendant a sum of Rs. 4,835 being the amount due in respect of calls made by the company and interest thereon. The contention of the defendant was that the call was not validly made. That contention was accepted by the trial Court which proceeded to dismiss the plaintiff's suit. The appellants have now come in appeal.

*First Appeal No. 32 of 1955.

1. (1948) 2 Ex. 118, 154 E. R. 429.
2. (1840) M & W 243.
3. (1877) 5 Ch. D. 687.
4. (1899) 42 Ch. D. 209.
5. (1926) 28 Bom. L. R. 411.
6. (1929) 32 Bom. L. R. 87.
7. (1932) 35 Bom. L. R. 26.

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

At a meeting of the board of directors held on the March 3, 1948 the directors resolved that a further call of Rs. 40 per share on B Class shares of the company and a notice of one month be given to all B Class shareholders to pay the same. The B Class shares are of the face value of Rs. 50 and Rs. 10 were paid up, and the defendant held 100 B Class shares of this company. Another meeting of the board of directors was held on June 22, 1948 and at this meeting the minutes showed that the opinion of the directors was divided as to the manner of requiring the calls to be paid, and the evidence of the manager Mr. Samant on this point is that the division of the directors was on the question as to whether the call should be for Rs. 40 at one time or whether the call should be by instalments. They were also divided as to what time should be given if the call was to be by instalments. The minutes of this meeting goes on to state :

"It was therefore resolved that the draft notice be finalised in consultation with the company's solicitors."

It is also in the evidence of Mr. Samant that he had produced before the meeting of the board a notice to be sent to the shareholders with regard to this call prepared by the solicitors. In this notice there were various blanks which were filled in by him, and turning to this draft notice it proceeds on the basis that the call was payable by four instalments and in this draft notice the dates of payment of the instalments are mentioned, the first instalment being payable on August 5, 1948, the second on September 5, 1948, the third on October 5, 1948, and the fourth on November 5, 1948. It is not quite clear from the language used in the minutes of this meeting as to what exactly was intended by the expression :

"It was therefore resolved that the draft notice be finalised in consultation with the company's solicitors."

But the evidence of Mr. Samant is that he finalised the draft notice himself and he then sent out notices to the shareholders in the form of the draft notice which was the final form of the notice. It is common ground that the final form never came before the board of directors. This particular notice was sent to the defendant on July 7, 1948 and she was called upon to pay the first instalment on August 5, 1948. As she failed to pay the first instalment, another notice was served upon her on August 17, 1948 by which she was reminded that the first instalment remained unpaid and notice was given to her to pay the remaining three instalments on the due dates, viz. September 5, October 5, and November 5, 1948. She failed to pay also the second instalment on the due date and a notice was served upon her on September 28, 1948 reminding her that the two instalments remained unpaid and calling upon her to pay the remaining two instalments on their due dates. A third reminder was sent to her on November 10, 1948 when she had failed to pay the remaining two instalments and she was requested to pay

the whole amount of Rs. 4,000 with interest thereon due by her. Finally, an attorney's notice was given to her on January 26, 1949 and in this notice it was stated :

"By a resolution of the board of directors dated March 3, 1948 it was decided that a further sum of Rs. 40 per share be called from B Class shareholders. By another resolution of the board of directors of the company dated June 22, 1948 it was decided to forward to the shareholders the notice demanding payment of the said call in the manner decided at that time."

The letter further says that in pursuance of these resolutions various notices were sent to the defendant and she was called upon to pay the amount. As she failed to comply with this requisition a suit was filed in the City Civil Court on February 14, 1951 which suit ultimately came to be dismissed by the learned Judge.

Turning to the articles of association which constitute the contract between the company and the shareholders and according to which a call can be made and the liability for the call can be imposed upon a shareholder , the two material articles are arts. 18 and 19. Article 18 provides:

"The directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the time and places appointed by the directors. A call may be made payable by instalments."

And article 19 provides:

"A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed."

It is clear that article 18 divides itself into two parts. The first deals with the authority of the directors to make a call and the second deals with the imposition of the liability upon the shareholder, and as a condition for imposition of the liability upon the shareholder the second part provides that the directors must appoint the person to whom the payment has to be made, the time at which it has to be made and the place at which it has to be made. Neither the first part nor the second part of art. 18 lays down the mode by which either the directors should make the call or impose the liability upon the shareholder. It is true, as pointed out by Mr. Desai, that the directors can only act at a meeting of the board of directors through resolutions passed at such a meeting, and therefore it was contended by Mr. Desai that the action of the directors both with respect to the making of the call and the imposition of the liability must be by resolution passed at a meeting of the board of directors. Our attention was drawn to art. 115 which makes it competent for a meeting of directors to exercise all or any of the authorities, powers and discretions by or under the articles of the company for the time being vested in or exercisable by the directors generally, and it was rightly pointed out that but for this article action could only

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

be taken by all the directors jointly, but art. 115 makes it competent to a meeting of directors, where all the directors are not present, provided a quorum is there, for such a meeting to transact the business which otherwise all the directors will have to transact. But as the argument was advanced to us with regard to the power of delegation of the directors, which we shall examine later, it is necessary to look at arts. 18 and 19 on the assumption that the directors could delegate their power vested in them under art. 18. Article 19 when read with art. 18 makes it clear that whatever power of delegation the directors may have generally, as far as the making of the call is concerned, a call can only be made by a resolution of the directors because art. 19 fixes the time when the call is deemed to be made and the time fixed is when the resolution of the directors authorises the call. Therefore it is clear that art. 19 contemplates and indeed requires the making of the call by a resolution passed by the directors at a meeting of the board of directors.

If every valid call has to be made by a resolution of the board of directors, the next question that we have to consider is, what are the essential features of a valid resolution making a call? It cannot be disputed that the amount of the call must be mentioned in the resolution. The question in controversy before us has been whether it is equally essential that the time when the call money should be paid by the shareholder should be mentioned in the resolution. Apart from authority, it is difficult to understand how the fixing of the time for the payment of the call is not an essential feature of the making of the call. A call imposes a liability upon a shareholder and that liability only commences from the time when he becomes liable to pay the call, and therefore authorising the call and fixing the amount of the call by themselves do not fix the liability upon the shareholder. It is further necessary that the time when the shareholder should pay the amount should be indicated so that the shareholder knows when he has to pay the amount and he also knows that failure to pay the amount will entail serious consequences. The other two requisites for imposing liability upon the shareholder, viz. the fixing by the directors of the person to whom the payment is to be made and the place where the payment is to be made, are not material requisites. Whatever the place that may be fixed and whoever the person may be to whom the payment is to be made does not in any way affect either the quantum of the liability or the time from which the liability is fixed. What is urged against this view is that although by reason of art. 19 a call can only be made by a resolution, art. 18 makes a distinction between the making of the call and the appointing by the directors of the place at which, the person to whom, and the time when the payment is to be made, and therefore it is urged

that all these three factors must stand on the same footing. If it is not necessary to fix the person to whom and the place at which payment is to be made by a resolution, it is equally not necessary to fix the time of payment. The fallacy underlying this argument is that although the second part of art. 18 mentions all these factors, it does not, as already pointed out, indicate how these factors should be appointed by the directors. It may be by a resolution or it may not be, the second part of art. 18 is silent. Therefore, if any of these factors are essential for the making of a call, then by reason of art. 19 that factor must form part of a valid resolution making the call. Therefore, there is not much substance in the contention that no distinction can be made as between person and place on the one hand and time on the other. A distinction has to be made because these three factors do not stand on the same footing. Whereas the person to whom the payment is to be made and the place at which the payment is to be made are trifling requirements of no substance and of no consequence, the time at which the payment is to be made is of considerable substance and of great consequence to the shareholder. We might also look at the provision with regard to the call being made payable by instalments. This provision appears at the end of art. 18 after art. 18 has dealt with the authority of the directors to make the call and the conditions imposing the liability upon the shareholder, and in our opinion this provision relates to the making of the call and therefore it must form part of the resolution authorising the call. This again is a matter of substance. Whether a call should be paid in one sum or by instalments goes to the question of the liability of the shareholder, and therefore this provision is as much of substance as the provision with regard to the fixing of time for the payment of the call. Therefore, the provision that a call should be made payable by instalments by reason of art. 19 can only be made by resolution properly passed by the directors.

Turning to the first aspect of the matter whether it is essential to indicate the time of payment in the resolution authorising a call, it is not disputed in this case that neither the resolution of March 3, 1948 nor the resolution of June 22, 1948 fix the time for payment, but what is urged by Mr. Engineer on behalf of the company is that it is not necessary for the validity of a resolution authorising a call that the time for the payment of the call must be stated in the resolution itself. There seems to be some conflict of judicial opinion on this point and it is necessary to briefly consider how the matter stands. The first important pronouncement on this point was in a very early case reported in *the Newry & Enniskillen Railway Co.* v. *Edmunds.*[8] In that case Baron Parke expressed the opinion that the resolution to

8. (1848) 2 Ex. 118, T. C. 154 E. R. 429.

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him 21 days for the purpose of payment, and the learned Baron referring to an earlier case of *the Great North of England Railway* v. *Diddulth*,[9] says that that case proves that the resolution need not contain the place of payment and he thought that by implication it also proved that it need not contain the time of payment, and he added:

"The resolution is nothing more than a determination, that thereafter 'a call' shall be made, that is, that an application shall be made to each shareholder for a proportion of his share; and it is enough if the directors appoint a time or place, either by public advertisement (where such a mode is allowed by the private act), as in the case referred to, or under the general act, by an individual notice to each shareholder." (p. 122).

These observations naturally have been very strongly relied upon by Mr. Engineer and he says that in this case the call having been made by the directors, the time and the place and the person to whom the payment is to be made was appointed by means of the notice served by the manager upon the shareholder.

There are two subsequent English cases which have struck a discordant note. The first is *Johnson* v. *Lyttle's Iron Agency*.[10] In that case there are weighty observations of so eminent an authority as Jessel, M. R., who seems to have taken the same view as Baron Parke in the earlier case. This is what the learned Master of the Rolls says (p. 690):

"Now it is quite clear that the Act of Parliament (and he was considering the sections which are similar to our articles) does not require the day for the call to be named in the same resolution as the one by which the call is made. You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape, or by resolution entered in the minutes. It is sufficient if they direct it. What shall be sufficient evidence of direction is another matter."

In that case, when it went to the Court of appeal, although the observations of Lord Justice James were obiter, the learned Law Lord did say at p. 694:

"I may add that as at present advised, I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the Secretary; it ought to be fixed by a formal resolution of the directors."

Neither Lord Justice Mellish nor Justice Baggallay expressed any opinion on this matter. This observation of Lord Justice James seems to have started a chain of thought which was

9. (1840) 7 M & W. 243.

10. (1877) 5 Ch. D. 687.

contrary to the view taken by Baron Parke and Jessel M. R. as already indicated, and as we shall presently point out, this indication given by Lord Justice James which is the contrary view seems to have ultimately stabilized itself in England as the correct view of the law.

The next case to which reference has been made is the case of *In re Cawley & Co.*[11] It may be said that the articles which came up for consideration by that Court were different from the articles we have to consider here, and Mr. Justice Chitty in the trial Court came to the conclusion that inasmuch as there was first a resolution making a call and a subsequent resolution where the time for payment was fixed, taking the two resolutions together there was a valid call as from the passing of the first resolution and not the second resolution. When the matter went in appeal the case was decided on a point with which we are not concerned, but Lord Esher, M. R., at p. 228 says (p: 228) :

"That would be an end of the case had it not been for the equity which has been alleged, and which I will deal with presently."

Then he proceeds to deal with this equity and he considered the question whether there was a good call on the date when the first resolution was passed, and this is what he says (p. 228) :

"Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board."

Lord Justice Cotton agrees with the Master of the Rolls on this point and this is what he says (p. 232) :

"When a man takes a share in a company, of course he thereby contracts with the company to pay the full amount of the share, but only to pay when and if the directors call for it to be paid up; and when one comes to look at art. 38 and other articles following it, I should say that a requisition on the shareholder to pay up the amount of his share should be by a resolution stating the amount to be paid and the time when it is to be paid."

Lord Justice Fry also took the same view and at p. 235 he observes:

"I am clearly of opinion that, according to the constitution of this company, no call was made until the time for payment was fixed."

What has been urged by Mr. Engineer is that these observations apply to the particular articles which those Law Lords were considering, and if our articles are different then that case is no authority for the construction of the articles before us. Unfortunately for Mr. Engineer, Lord Esher, M. R., after having already delivered the main judgment thought it proper to deliver a supplementary judgment which is at p. 236, and this is what the learned Master of the Rolls says:

11. (1889) 42 Ch. D. 209.

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

"I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of a call that the time and place for payment should be determined."

When we turn to the acknowledged text books on Company Law, where one would normally expect the correct statement of the law to be laid down, first is Palmer's Company Law, p. 127, where the learned author says:

"In making a call care must, therefore, be taken that the directors making it are duly appointed, and duly qualified that the meeting of directors has been duly convened, that the proper quorum is present, and that the resolution making the call is duly passed and specifies the amount of the call, the time and place of payment—for these are of its essence—and to whom the call is to be paid."

Therefore, according to this learned author, time and place are both of the essense, apparently following the view of Lord Esher, M. R., but he puts the person to whom the call is to be made in a different category. Then turning to Buckley on the Companies Act, Twelfth Edition, at p. 805 the learned author says:

"A resolution for a call must state not only the amount of the call, but also the time (or, if payable by instalments, the several times) at which it is to be paid. If the date for payment be left in blank there is no valid call.

The time fixed for payment of a call should be fixed by a formal resolution of the directors, not by a mere verbal direction to the secretary."

Therefore, Buckley does not attach the same importance to the place where the payment is to be made and confines his observations with regard to the validity of the resolution only to the time for payment. Then turning to Stiebel's Company Law & Precedents, at p. 197 the learned author says:

"The date when a call is payable is of the essence of the call, and there will be no proper call until a resolution has been passed fixing both the amount and the date of the call; it would appear to be probable that a verbal direction to the secretary fixing the date of the call is not enough."

Halsbury, 3rd edn., Vol. VI, p. 227 says :

"The resolution must comply with the provisions of the articles and must in any case state the amount of the call and the time at which it is to be paid; otherwise the call will be invalid."

It will be noticed, again following the view of Lord Esher, that the learned author makes the time at which the call has to be paid an essential ingredient of a valid resolution independently of the provisions of the articles. Therefore, whatever might have been the position when Baron Parke and Sir John Jessel—undoubtedly both eminent authorities—made observations on which Mr. Engineer has relied, the position today in England with regard to this particular aspect of the matter is beyond doubt.

It is then argued by Mr. Engineer that whatever the English law might be, we are bound by the decision of a Division Bench of this Court, and the decision relied on is the decision of Sir John Beaumont, Chief Justice, and Mr. Justice Blackwell in *Dhanraj* v. *Wadia.*[12] As Sir John Beaumont says, it was rather a startling case. It was a claim by the company to include a shareholder whose shares had been forfeited as a contributor, and the ground on which this application was made was that the forfeiture was bad because the resolution making the call was not a valid resolution. The most significant feature of that case is that as a matter of fact this particular resolution did mention the time for paying the call. What was not mentioned was the place at which the payment should be made and the person to whom the payment should be made. Therefore, strictly, the observations of the learned C. J. with regard to the question of time are obiter, but even so one must respect the observations of such an eminent Judge as Sir John Beaumont and let us see whether these observations really are of help to Mr. Engineer. At p. 30 the learned Chief Justice says:

"As a matter of construction I can see no justification for reading the conditions necessary to impose liability to pay upon the member into the first part of the article authorising the directors to make a call."

We might point out that the articles the learned Chief Justice was considering were identical with arts. 18 & 19. It may be said that these are really model articles which are to be found in most articles of association. Then the learned Chief Justice goes on (p. 30) :

"It seems to me that the directors may (as they did in this case) pass a resolution making a call of a particular amount payable at a particular time, and that that resolution constitutes a valid call and fixes the date of the call, although before the payment of the call can be enforced the directors must appoint the persons to whom and the place where the call is to be made."

Therefore, the learned Chief Justice emphasises the fact that the resolution constituted a valid call because it made a call of a particular amount payable at a particular time. Then the learned Chief Justice refers to the case of *The Newry and Enniskillen Railway Company* v. *Edmunds,* to which we have already referred, and then he deals with the case of *Johnson* v. *Lyttle's Iron Agency,* and says that the decision and view of Sir George Jessel, M. R., was a direct decision and a view necessary for the arriving at that decision and that the views expressed by Lord Justice James were merely tentative views, and then the learned Chief Justice observes (p. 32) :

"It appears to me that that case is a direct authority for the proposition that under such articles as we have in this case it is not necessary for the resolution making the call to specify the time for payment,

12. (1932) 35 Bom. L. R. 26.

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

and it would seem to follow *a fortiori* that it is not necessary to specify the person to whom or the place where the call is to be made. I need hardly say that the opinion of Sir George Jessel as to the construction of articles of association is entitled to very great weight."

This is the passage on which Mr. Engineer has very strongly relied, but it must be borne in mind that the learned Chief Justice was not really concerned with the aspect of the matter with which we are concerned. He did not have a resolution before him which did not mention the time of payment. He was concerned with a resolution where the place at which the payment should be made and the person to whom the payment should be made were not mentioned, and therefore the weight, the value, and the validity of this observation really attaches to the question the learned Chief Justice had to consider with regard to the absence of the place and the person from the resolution. He then refers to *Cawley's* case and he dissents from the view taken by Lord Esher M. R. Unfortunately, with very great respect to the learned Chief Justice, his dissent does not seem to have been followed by all the learned text writers on the subject who all seem to have preferred the views of Lord Esher M. R. to the views of the other Master of the Rolls Sir George Jessel. Then the learned Chief Justice refers to the two Indian decisions. First is the judgment of Mr. Justice Taraporewala in *Pioneer Akali Works* v. *Amiruddin.*[13] In that case Mr. Justice Taraporewala followed *Cawley's* case, but the learned Chief Justice distinguished it on the ground that inasmuch as the amount of the call was not specified in the resolution, the resolution was bad anyhow. Then there is a subsequent judgment of a Division Bench in *Bhagirath Spinning & Weaving* Co. v. *Balaji,*[14] which follows the judgment of Mr. Justice Taraporewala, and the learned Chief Justice dismisses the learned Judge's observation by saying that the learned Judges who decided the case do not mention the terms of the articles which the Court had to construe. Then there is rather an illuminating passage in the judgment of the learned Chief Justice at p. 34:

"But speaking for myself, I do not think that it is necessary to have a formal resolution of the directors specifying the person to whom, and the place where, a call is to be made. These are minor matters of much less consequence to a shareholder than the fixing of the time for payment, and, as I have pointed out, Sir George Jessel M. R. in *Johnson* v. *Lyttle's Iron Agency* held that even the fixing of time need not be the subject of a formal resolution, though James L. J. differed from this view."

Therefore, the learned Chief Justice himself realised the vital distinction between the person to whom and the place where a call is to be made and the time for payment, and really it is on this vital distinction that the text book writers following Lord

13. (1926) 28 Bom. L. R. 411.

14. (1929) 32 Bom. L. R. 87.

Esher M. R. have made a difference in requiring that whereas to the validity of a resolution the mention of the place and the person is not necessary, the time for payment is necessary. Again, with respect to the learned Chief Justice, we are not at all satisfied that if he had to consider a case of a resolution making a call where the time for payment was not specified, in view of his observation just referred to he would have come to the conclusion that the resolution was still valid. It is strictly not necessary for us to say that we dissent from the view taken in *Dhanraj* v. *Wadia*,[15] because it is not very clear what view the learned Chief Justice takes on this point. But in any view of the matter, the observations of the learned Chief Justice, even if they help Mr. Engineer, are clearly obiter and all that is binding on us is the decision that where the place at which and the person to whom the call is to be made are not mentioned in the resolution that does not affect the validity of the resolution.

If, therefore, this be the correct view of the law that a resolution making the call must specify the time of payment, then it is clear that the resolutions on which the plaintiff company relies are not valid resolutions making a call. The first resolution of the March 3, 1948 merely mentions the amount and the period of the notice. The second resolution gives the interesting information that the directors are divided in their view and resolves that the draft notice be finalised in consultation with the company's solicitors. Therefore, in our opinion, apart from any other consideration the two resolutions, even taken together and read together and accepting the view of Mr. Engineer that these two resolutions make a valid call, in our opinion as neither of these two resolutions specifies the time for making the payment they fail to make a valid call as required by law.

We are also in agreement with Mr. Desai that these resolutions suffer from another infirmity, and that is that they do not decide that the amount of the call should be paid by instalments. We have already indicated our opinion on a construction of arts. 18 and 19 that the payment of call by instalments is as essential a feature of a resolution making a call as fixing of time for payment, and on the evidence of Mr. Samant it is clear that the directors had not made up their minds nor did they know their minds as to whether the call should be paid in one sum or by instalments. Therefore, the directors never resolved that this call should be paid by instalments. Faced with this difficulty Mr. Engineer has relied on the principle of delegation and his contention is that the fixing of the time can be delegated by the directors by a proper resolution to the manager and in his submission the manager has fixed the time by reason of the power delegated to him.

15. (1932) 35 Bom. L. R. 26.

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

Mr. Engineer advanced the proposition which seems to us rather startling that there is nothing in law to prevent the directors from delegating to a manager the power to make a call, and according to him the directors could leave it to the manager to decide whether a call should be made at all, when it should be made and what the amount of the call should be. When one remembers that the power to make a call is in the nature of a trust and it is to be exercised in the interests of the company, it is rather difficult to accept the proposition that such an important power which is vested in the directors could be delegated by them to any one and could be exercised by any one.

Reliance was placed on art. 130 for this purpose, and that article provides

"(a) The directors may from time to time entrust to and confer upon a manager and/or managing director for the time being such of the powers exercisable under these presents by the directors as they may think fit, and may confer such powers for such time, and to be exercised for such objects and purposes, and upon such terms and conditions, and with such restrictions as they think expedient; and they may confer such powers, either collaterally with, or to the exclusion of, and in substitution for, all or any of the powers of the directors in that behalf; and may from time to time revoke, withdraw, alter, or vary all or any of such powers."

Mr. Engineer's contention is that the powers referred to in this article would include the power of making a call. It is significant that art. 115 which deals with the exercise of powers by the directors at a meeting where a quorum is present, deals with the authorities, powers and discretions vested in or exercisable by the directors. In art. 125 (*3*) also, which deals with setting up of a local management outside the place where the head office is situated, the power is given to the directors to delegate to any person appointed a local manager any of the powers, authorities and discretions for the time being vested in the directors. But when we turn to art. 130 obviously the intention was to confer upon the directors the right of delegation which was much narrower in its extent than the one referred to in art. 115 or art. 125 (*3*). Mr. Engineer says that there is no distinction between the two expressions used. Now, the normal canon of construction either of a statute or of articles of association is that when different expressions are used they are intended to connote something different, and the draftsman of these articles had art. 115 and art. 125 (*3*) before him and having used words of the widest import when he comes to art. 130 he uses an expression of a narrower application; clearly the intention must be not to refer to every authority and every discretion exercisable by the directors under the articles. It would indeed be a serious view to take that under art. 130 the directors could leave it to the manager to exercise the discretion or exercise the autority which the articles require they should exercise, and nothing is more patent than this that the contract between the

company and the shareholders which is embodied in the articles requires that the directors must exercise their discretion and decide whether a call should be made at all and the amount of the call and the time when the call should be made. We refuse to countenance the contention that such a power could be delegated by the directors to the manager or to any one else. But really in a sense this argument is academic. We only noticed it because it was strenuously urged before us, because as we have already pointed out even Mr. Engineer concedes that even though there may be a power of delegation under art. 130 of the widest character, when we look at art. 18 and read it with art. 19, a call can only be made by a resolution of the directors, and therefore as far as the making of the call is concerned that is a power or a discretion or an authority which cannot be delegated to the manager or to any one else.

It is then urged that when we look at the second resolution of June 22, 1948, in effect the directors have fixed the time for payment, and therefore even on the assumption that the fixing of time is essential for the validity of a resolution of call, the requirement is satisfied. Really, the resolution of June 22, 1948 is very difficult to understand. One thing is clear that the directors could not make up their minds as to whether the call should be paid in one sum or by instalments and the time of the payment of instalments. In view of this position, we fail to understand how it could be seriously urged that by this resolution the directors fixed the time when the payment of the call should be made. What is urged is that we must look at the second part of the resolution which resolves that the draft notice be finalised in consultation with the company's solicitors, and what is pointed out is that the evidence of Mr. Samant is that the draft notice which was placed before the board of directors was on the basis of call being paid by instalments and also mentioned the time when these instalments should be paid. We will accept the evidence of Mr. Samant—there is no reason why we should not—, but even accepting that evidence it is impossible to take the view that the board of directors on June 22, 1948 accepted the basis of that notice and concurred with the view of the manager which seemed to have been given expression to in the draft notice that the call should be made by instalments and the time when the instalments should be paid. If that had been the position, there was no reason why the resolution of June 22, 1948 should have proclaimed to the world the disagreement among the directors, nor was it necessary to resolve that the draft notice should be finalised in consultation with the company's solicitors. If the basis of the draft notice was accepted, nothing was simpler than to pass a resolution approving of the draft. But that was not done precisely because the draft was not approved.

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

There is further confusion caused by this resolution because it does not state who is to finalise the notice. Mr. Samant does suggest that he was given to understand that he had to go to the solicitors and get the notice finalised. But the expression "finalised" can only refer to the form and not to the substance. This part of the resolution does not seem to have left it to the manager to decide the substance of the notice or to resolve the conflict which was present among the directors as to whether the call should be paid in one amount or by instalments. Therefore, if only the finalising in the sense of settling the proper form was left to the manager, then it is clear that the resolution expected the notice to come back to the directors for their imprimature. The most curious feature of this case is that at no time did the directors ever express their approval to the substance contained in the notice, substance of the most vital importance, substance with regard to the payment of the call by instalments, substance with regard to the time at which those instalments were to be paid. Nor does this resolution clearly authorise the manager to issue the notice after it was finalised. Mr. Engineer says that this was merely a ministerial act and the notice was issued and the notice purports to have been issued by order of the board of directors. We agree with Mr. Engineer that when a notice issued by an officer of a company purports to have been issued by order of the board of directors, there is a presumption that it was issued pursuant to such an order, and unless the presumption is displaced the Court must act on that presumption. But what we are dealing with here is the resolution which is before us and which speaks for itself. We are not concerned with any authority that the directors might have given to the manager independently of this resolution. It was therefore not a formal matter for the directors to decide that the notice should be issued. Having failed to agree on a substantial question, having directed the manager, assuming it was the manager, to finalise the notice in consultation with the company's solicitors, it was essential that the board of directors, after the notice was finalised, should direct the manager to issue the notice. Therefore, in this case this is not a mere technicality but something which goes to the root of the matter because it shows clearly that the directors never applied their minds to the question of the call being payable by instalments or the time the instalments should be paid.

Therefore, in our opinion on the terms of this resolution, even assuming it was open to the directors to delegate to the manager the fixing of the time and the decision with regard to instalments, there is no clear delegation established on the terms of this resolution. If the power of delegation is to be exercised, it must be clearly exercised. If the directors do not wish to do what the articles require them to do and leave the doing of it

to some one else, they must clearly resolve to the effect. We see nothing in the resolution of June 22, 1948 to indicate that the directors, assuming they had the power of delegation, delegated to the manager not only the finalising of the notice in the sense of seeing that it was in proper form, but the substance of the matter that he was to decide whether the call was payable by instalments and the time when the instalments were to be paid. Therefore, the notice issued by the manager was without authority. Therefore, even on this narrow ground, apart from the more important ground that we have considered, there was no authority in the manager, no authority given to him by the directors, to issue a notice calling upon the shareholders to pay the call by instalments and the time when those instalments should be paid.

Another point has been urged by Mr. Desai to which a passing reference might be made. The original resolution of March 3, 1948 as already pointed out required that a notice of one month should be given to all the B Class shareholders to pay the call, and Mr. Desai points out that when in fact the notice came to be given on July 7, 1948 the shareholder was called upon to pay the first instalment on August 5, 1948 which gave him less than one month's notice. It was attempted to be argued by Mr. Engineer that in law the shareholder could only be proceeded against when he had failed to pay the last instalment and no liability would arise till the date fixed for the payment of the last instalment, and on that basis it was sought to be argued that the notice of July 7, really required the payment in law on November 5, 1948 and not August 5, 1948, and therefore the notice was a proper notice. Mr. Desai has rightly drawn our attention to the articles which require calls payable by instalments to be paid at the due date of every instalment and he has also pointed out that not only is there a liability upon the shareholder to pay the instalment on the due date, but the consequence of not paying the instalment on the due date is the liability to have his shares forfeited. Therefore, whatever the decisions on which Mr. Engineer relies lay down—and those decisions would only be true with reference to the particular articles there—on the articles that we have before us it is clear that there is a liability upon the shareholder to pay the first instalment on the due date and that liability could have been enforced by the company and therefore Mr. Desai is right that one month's notice was not given to pay the first instalment and to that extent the notice failed to carry out the mandate given by the resolution of March 3, 1948. There are two answers given by Mr. Engineer to this contention. One is that even assuming the notice with regard to the first instalment is insufficient, there is no answer with regard to the notice to the second, third and fourth instalments which are all made payable more than one month after the notice, and Mr. Engineer also

1956

EAST AND WEST INSURANCE CO., LTD. v. KAMLA JAYANTILAL

Chagla C. J.

relied on certain English cases for the purpose of contending that a notice which is irregular does not invalidate the call. We should have thought on first principles that a requirement with regard to a notice being a concession given to the shareholder by the articles, that concession may be waived, but if it is not waived the requirement of the notice must be strictly complied with, and as no plea has been made here of a waiver of the notice by the shareholder, it is difficult to understand how if the notice is bad the Court could uphold the claim for the call. But in our opinion it is unnecessary to decide the rather interesting question raised by counsel at the Bar.

Some faint suggestion was also made by Mr. Engineer that the doctrine of ratification would come into play in this case and the doctrine of ratification is relied upon by reason of a resolution to which we have not yet referred which was passed by the board of directors on September 13, 1949, and that resolution considered the notice issued by the manager on July 7, 1948 and resolved to adopt and ratify the said notice and the manner, mode and time of recovering the said unpaid balance of Rs. 40 on each B Class share. Therefore, this was the first time, on September 12, 1949, that the directors in their wisdom considered the notice which had been issued as far back as July 7, 1948. It will be noticed that what has been ratified is the notice and the manner, mode and time of recovering the unpaid balance of Rs. 40. The resolution does not even purport to ratify the resolution making the call on March 3, 1948 and the subsequent resolution of June 22, 1948. It is difficult to understand how, if the resolution making the call was invalid, it could be subsequently rendered valid by anything that the directors might do on September 12, 1949. The basis of the call and the basis of the liability of the defendant is the two resolutions of March 3, 1948 and June 22, 1948. If those resolutions are invalid, they cannot be rendered valid by the resolution of September 12, 1949. This is not a case where a valid resolution has been passed by some one lacking the necessary authority. In that case the persons with the requisite authority may adopt the resolution validly passed and thereby ratify it. But where the objection to the resolution is not the wanting of authority but illegality in the very making of it, in the very passing of it, then it is impossible to accept Mr. Engineer's contention that the doctrine of ratification can validate a resolution which when it was passed was invalid.

Under the circumstances we are of the opinion that the call was not validly made and the learned Judge below was right in dismissing the plaintiff's suit. The result will be that the appeal is dismissed with costs.

Appeal dismissed.

G. N. V.