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are referred to, and *Van Ingen* v. *Dhunna Lall*(1). The plaintiff thus possesses all the characteristics of a holder in due course as defined in section 9 of the Negotiable Instruments Act, and his suit cannot be resisted. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. February 19, 22. March 3.

N. P. N. M. CHITHAMBARAM CHETTIAR (PETITIONER—PLAINTIFF), APPELLANT,

v.

KRISHNA AIYANGAR AND OTHERS (RESPONDENTS—DEFENDANT), RESPONDENTS.*

Indian Companies Act, VI of 1882, *s.* 76—*Alteration of memorandum of association by articles—To what extent a company can by resolution alter articles.*

Under section 76 of the Indian Companies Act anything which appears in the articles of association but is not provided for in the memorandum of association may be altered by a special resolution.

Where the articles of association provide for matters which need not, under section 8 of the Companies Act, be contained in the memorandum of association and which are not either expressly or impliedly dealt with by such memorandum, the portions of the articles dealing with such matters cannot be treated as part of the memorandum and can be altered by a special resolution of the company.

Rights which have their origin in a contract outside the articles, the terms of which contract are found in or referred to in such articles, can be altered by such alteration of the articles unless it is proved that one of the terms of such contract was that such rights should not be affected by an alteration of the articles.

Facts are sufficiently stated in the judgment.

APPEAL against the order of K. Ramanatha Ayyar, Subordinate Judge of Tinnevelly, dated 8th July 1908, in Miscellaneous Petition No. 7 of 1908 in Original Suit No. 58 of 1907.

P. R. Sundaram Ayyar, K. Srinivasa Ayyangar and *R. Rangaswami Ayyangar* for appellant.

Joseph Satya Nadar for fifth respondent.

The Hon. The Advocate-General, and *C. V. Anantakrishna Ayyar* for eighth respondent.

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(1) (1882) I.L.R., 5 Mad., 108.

* Civil Miscellaneous Appeal No. 143 of 1908.

JUDGMENT.—The Tinnevelly Bank, Limited, was incorporated in 1896. According to the memorandum of association the appellant and another, their heirs, executors and administrators were to be Secretaries of the Bank, but from 1902 the appellant alone has been doing duty as Secretary. The duties and emoluments of the Secretaries are set out in the articles of association but not in the memorandum of association. On the 1st November 1907 the shareholders at an ordinary general meeting decided to appoint a certain person as managing agent of the Bank with powers of superintendence over the appellant. The appellant was also deprived of the keys of the Bank safe. The appellant therefore filed Original Suit No. 58 of 1907 against seven Directors of the Bank and the person appointed managing agent as above mentioned. He prayed among other things that the keys might be delivered over to him, that a permanent injunction might be issued to the defendants restraining them from interfering with the performance of his duties as Secretary, and that the eighth defendant's appointment as managing agent might be declared invalid. He also filed on interlocutory application for a temporary injunction, praying that the defendants might be restrained from doing any acts to prejudice his position and standing as Secretary of the Bank, and that the eighth defendant might be restrained from in any way dealing with the funds of the Bank. There were other prayers which it is agreed are not now material. After the filing of the above suit and interlocutory application an extraordinary general meeting was held on the 12th February 1908 in pursuance of the resolution of the 1st November 1907, and the special resolution (exhibit X) was passed and duly confirmed on the 8th March 1908 by exhibit X (*a*). By exhibit X the articles of association were modified, and the powers and emoluments of the Secretary curtailed. Thus the pay of the Secretary was reduced from Rs. 250 to Rs. 25 a month, most of his powers were transferred to the newly appointed agent, and it was provided that the duties of the secretary should be determined and varied by the Directors as they might from time to time think fit. Now although the resolution exhibit X was passed after the suit and application for temporary injunction were filed, it is manifest that if the resolution was within the powers of the Company the appellant is no longer entitled to claim the powers and emoluments which he

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originally possessed, and which by obtaining an injunction he seeks to maintain. The Court in those circumstances would certainly not now grant the injunction prayed for. The question for determination therefore is whether the resolution exhibit X is a valid resolution. It is argued for the appellant that the resolution is invalid, because in effect it alters the memorandum of association, and because it amounts to a breach of contract by the Company with regard to the terms upon which the appellant took up the secretaryship.

The resolution exhibit X does not alter the memorandum of association. It is no doubt true that, although the condition inserted in the memorandum of association that the appellant and another, their heirs, etc., shall be secretaries of the Bank is not one of the things which under section 8 of the Indian Companies Act VI of 1882 a memorandum of association is bound to contain, nevertheless the restrictions placed by section 12 of the Act upon modification of the conditions contained in the memorandum of association apply to this condition also. Vide *Ashbury* v. *Watson*(1). But exhibit X does not purport to cancel the appointment of the appellant as secretary to the Bank or to take away the right of his heirs, etc., to succeed him in that office. It is contended however that as a condition regarding the appellant's appointment as secretary appears in the memorandum of association without setting out the secretary's powers, that portion of the contemporaneous articles of association which sets out the powers, etc., of the secretary must be read as part of the memorandum of association. In support of this contention the following passage from Lindley on Companies, Vol. I, 6th edition, page 163, is quoted : "If the memorandum is ambiguous, or silent on a matter which the Act does not require to be stated therein, contemporaneous articles may be looked at to explain its meaning or to control or rebut an inference which might otherwise be drawn from its silence." In the present case there is question of ambiguity. The question is one of silence with regard to the powers of the secretary. The case on which the relevant portion of the above passage is based is *Harrison* v. *Mexican Railway Co.*(2), and what is relied upon is that portion of the head note which says "if the memorandum and articles of association of a Company are silent

(1) (1885) 30 Ch.D., 376.

(2) (1875) 19 Eq., 358.

on the subject, it is an implied condition that the shareholders are entitled to rank equally as regards dividend, without preference or priority between themselves; but such implication will be rebutted if the articles of association, contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares." The law as above set out is what was stated by Sir G. Jessel to be the effect of the second decision of Vice-Chancellor Kindersley in *Hutton* v. *Scarborough Cliff Hotel Company*(1), a decision which was overruled in *Andrews* v. *Gas Meter Company*(2), where it was pointed out that if the memorandum of association expressly or impliedly prescribed equality among the shareholders the articles of association even though contemporaneous could not override the memorandum of association in that particular. There is therefore no reason so far as the present contention is concerned for departing from the ordinary rule that anything which appears in the articles of association but is not provided for by the memorandum of association may be altered by special resolution under section 76 of the Act. We cannot therefore read that portion of the articles of association which sets out the powers of the secretary as part of the memorandum of association, and as therefore not liable to be altered by special resolution under section 76.

The remaining question is whether the resolution exhibit X is invalid because it amounts to a breach of contract by the company with regard to the terms upon which the appellant accepted the post of secretary. It is contended that it was only upon the terms set out in the articles of association as they originally stood that the appellant agreed to be secretary. It is not pretended that there is any direct evidence of the alleged agreement, nor have we been asked to have evidence recorded regarding it. What we are asked to do is to infer the agreement from the admitted facts. Under the articles of association each secretary is to hold at least 50 shares of the Bank, and from this we are asked to infer that the appellant would never have taken up 50 shares and the post of secretary unless it was understood that his emoluments and powers as originally fixed in the articles of association were not to be reduced by any subsequent alteration of the articles. The law applicable to the question is thus laid

(1) 2 D. & S., 521. (2) (1897) 1 Ch.D., 361.

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down in Lindley on Companies, Vol. I, 6th edition, at page 463: "If the rights which it is proposed to alter are not merely incidental to membership, and are not conferred only by the articles but are dependant wholly or in part on a contract outside the articles, of which the terms are to be found in the articles or by reference to them, the power to alter such rights by an alteration of the articles depends upon whether such alteration is or is not consistent with the real bargain between the parties, or in other words, whether there was any express or implied agreement between them that a subsequent alteration of the articles should not affect the terms of the contract. But when considering contracts referring to revocable articles it must not be assumed that the contract involves as one of its terms that the articles shall not be altered and the terms of the contract thereby varied. If there is any such agreement these rights cannot be altered by an alteration of the articles; if there is no such agreement they can be so altered, provided the alteration does not affect rights which have ripened into claims for something already done under the contract in its original form." Now it is a very significant circumstance that, while the appellant's right to the post of hereditary secretary is safeguarded by being made one of the conditions of the memorandum of association, his powers and emoluments are set out only in the articles. This seems to us to indicate *primâ facie* that while the Company was prepared to have hereditary secretaries it meant to retain in its hands full power of control, so to be able to limit the secretaries' powers to such as experience showed they might safely be entrusted with, and their emoluments to such as their merits or the position of the Company warranted. The powers and emoluments of the secretaries being set out only in the articles of association which are ordinarily alterable, the appellant must fail unless he proves the agreement he sets up. We do not think there is anything in the facts which would justify us in inferring the existence of such an agreement. The probabilities seem to us to point the other way. As to the condition that each secretary should hold at least 50 shares it is to be observed that condition is abolished by exhibit X. We are of opinion that exhibit X is a valid resolution, and dismiss this appeal with costs.