

EXTRAORDINARY ORIGINAL CIVIL.

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March 21.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.

*Company—Application for registration—Act X of 1866 (Indian Companies Act)
—Application received while Act X of 1866 was in force—Delay in office
of Registrar—Certificate purporting to be issued under Act X of 1866,
but issued after repeal thereof by Act VI of 1882—Act I of 1863 (General
Clauses Act), s. 6—“Proceedings commenced”—Company held to have been
registered under Act X of 1866—Practice—Costs.*

Prior to the 1st May, 1882, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and owing to delay, for which the applicants were not responsible, registration was not effected and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May, 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, s. 28 of which provided that every share in any Company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The shareholders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently, the Company having gone into liquidation, the Official Liquidator sought to make the shareholders contributories to the assets of the Company as the holders of shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act VI. of 1882.

Held that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration, commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April, 1882, while Act X of 1866 was in force; that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of s. 28 of Act VI of 1882 not being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares.

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The Official Liquidator's application to place the shareholders upon the list of contributories having been *bonâ fide* made in the liquidation, the Court ordered that the costs of each side should be paid as a first charge out of the estate.

THIS case was transferred by the High Court, under s. 25 read with s. 647 of the Civil Procedure Code, to its own file from the Court of the District Judge of Saháranpur, and the circumstances connected with the transfer are stated in the report at I. L. R., 9 All., 180. The facts of the case were as follows:—

ON or about the 13th June, 1860, a Company called the West Hopetown Tea Company, Limited, the object of which was the cultivation of tea at a plantation called the West Hopetown Estate near Dehra Dún, was registered under Act XIX of 1857, the Indian Companies Act then in force. Its nominal capital was Rs. 1,09,000 in 18½ shares of Rs. 6,000 each. Early in 1882 it was determined to re-construct the Company, the principal reason assigned being that the shares were too large to be readily saleable. On the 11th March, 1882, an extraordinary general meeting of the shareholders was called for the purpose of considering a scheme of re-construction, and certain resolutions were passed, and were confirmed by another extraordinary general meeting held on the 27th March. At the latter meeting all the shareholders of the Company (nine persons) were present, either in person or by proxy. The resolutions passed were as follows:—

“1. That the Company be wound-up voluntarily, and that Mr. C. G. Vansittart be and hereby is appointed liquidator for the purpose of such winding-up.

“2. That the following scheme of re-construction be, and the same is hereby approved, *viz.*, that a new Company be incorporated under the Indian Companies Act, X of 1866, as a Company limited by shares, by the name of the West Hopetown Tea Company, Limited, with a capital of Rs. 3,00,000 divided into 3,000 shares of Rs. 100 each, with power to increase, and having power to acquire and take over the business, property and liabilities of this Company; that of the capital, Rs. 2,50,700 be allotted to the shareholders of this Company, being at the rate of twenty-three fully paid up shares in the new Company for every Rs. 1,000 invested by shareholders in this Company, and the balance of the 3,000 shares be issued by the Directors when and as they think fit; that the said liquidator be and is hereby authorized, pursuant to s. 175, Indian Companies Act, X of 1866, to sell to such new Company upon the above terms the property of this Company, but so that the new Company shall also undertake all the liabilities of this Company, and shall pay the costs of winding-up;

and that the said liquidator be and is hereby authorized to execute and do all such things as may be necessary for carrying out the above scheme into effect."

On the 8th April, 1882, the following letter was sent:—

"No. 185.

"WEST HOPETOWN TEA CO., LIMITED, DEHRA DUN."

8th April, 1882.

"To the Registrar of Joint Stock Companies, Allahabad.

"SIR,—I enclose herein the following papers:—

"(i) Duly stamped and executed memorandum and articles of association of the West Hopetown Tea Company, Limited.

"(ii) Treasury receipt for Rs. 225 paid into the Dehra Treasury, as required under s. 17, Act X of 1886.

"(iii) Treasury receipt, *vide* my No. 175 of 1st instant.

"Kindly return the receipts to me after you have done with them, and grant me a certificate of incorporation.

Yours, &c.,

C. G. VANSITTART,

Secretary and Manager."

Upon this letter the following memorandum, dated the 29th April, 1882, and initialled R. B. C. (the initials of the Head Assistant of the Registration Office, Allahabad), was endorsed:—

"Mr. Vansittart has sent for registration the memorandum of association and articles of association of the West Hopetown Tea Company; and has paid into the Dehra Dun Treasury on account of registration fees Rs. 225, but we only require Rs. 155, according to the following calculation:—

"TABLE B, ACT X OF 1886.

| | Rs. |
|--|-----|
| For a capital of Rs. 20,000 | 40 |
| Above Rs. 20,000 up to Rs. 50,000, Rs. 20 for each Rs. 10,000 ... | 60 |
| Above Rs. 50,000 up to Rs. 1,00,000, Rs. 5 for each Rs. 10,000 ... | 25 |
| Above Rs. 1,00,000, Rs. 1 for each Rs. 10,000, <i>i.e.</i> , Rs. 3,00,000 in this case | 20 |
| Total | 145 |
| For registering articles of association | 5 |
| Certificate of registration | 5 |
| Total | 155 |

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"I do not know how this is to be remedied. We must give a certificate of registration. In this certificate we shall have to state the amount paid. If we enter Rs. 225, and then refund the excess paid, the Company will hold a certificate as having paid a larger sum than they actually did. So that the refund, if it be given, must be made before the Company is registered."

After the 29th April no further steps were taken in the Registration Department until the 6th May, when the Officiating Registrar of Joint Stock Companies made the following order:—

"Refund the excess and then register, showing the proper fees."

Between these two dates, that is, on the 1st May, 1882, the Indian Companies Act, VI of 1882, repealing Act X of 1866 came into force, having received the assent of the Governor-General on the 24th February. After a further delay of nearly a fortnight, the Head Assistant sent the following letter:—

"No. 40.

"19th May, 1882.

"To C. Vansittart, Esquire, Secretary and Manager, West Hopetown Tea Co., Limited.

"Sir,—In reply to your No. 185, dated 8th ultimo, I have the honor to point out that you have paid Rs. 70 too much on account of registration fees. The capital of your Company is Rs. 3,00,000. The fees payable by you are as follows, calculated according to Table B of Act X of 1866:—

| | Rs. |
|--|-----|
| For the first Rs. 20,000 | 40 |
| Above Rs. 20,000 up to Rs. 50,000, Rs. 20 for each Rs. 10,000 | 60 |
| Above Rs. 50,000 up to Rs. 1,00,000, Rs. 5 for each Rs. 10,000 | 25 |
| Above Rs. 1,00,000, Rs. 1 for each Rs. 10,000 | 20 |
| Total | 145 |
| For registering articles of association | 5 |
| For certificate of registration | 5 |
| Total | 155 |

"You should apply to the Collector for a refund of Rs. 70. When you have obtained the refund, I shall feel obliged by your intimating the fact to me, as until then I shall not be able to register the papers sent by you."

This letter was signed by both the Head Assistant and the Officiating Registrar. On the 23rd June, 1882, the following answer was returned :—

“ WEST HOPETOWN,

June 23rd, 1882.

“ *To the Registrar, Joint Stock Companies, Allahabad.*”

“ SIR,—With reference to your No. 40, dated the 19th ultimo, I now beg to advise you that the Rs. 70 overpaid has been refunded to me by the Dehra Dún Treasury, and I beg to thank you for pointing out the error.

Yours faithfully,

C. G. VANSITTART,

Secretary and Manager”

In reply, the Head Assistant, on the 8th July, 1882, forwarded a certificate of registration to the following effect :—

“ In the office of the Registrar of Joint Stock Companies, North-Western Provinces and Oudh.

In the matter of the West Hopetown Tea Company, Limited.

“ I do hereby certify that pursuant to Act X of 1866 of the Legislative Council of India, entitled the Indian Companies Act, memorandum of association and articles of association have been this day filed and registered in my office, and that the said Company has been duly incorporated, and is a company limited by shares pursuant to the provisions of the said Act.

“ 3rd July, 1882, at Allahabad.

T. BENSON,

Assistant Registrar of Joint Stock Companies, N.-W. P. and Oudh.”

Clause 3 of the Memorandum of Association, stating the objects for which the Company was established, contained the following sub-clause :—

“ (a) To purchase or otherwise acquire and undertake all the business, property and liabilities of the West Hopetown Tea Company, Limited (now in liquidation), and of any other Company, together with the manufactories, land, buildings, plant, stock-in-trade, chattels and effects used in the said business, and the contracts subsisting in relation thereto, and the good-will thereof.”

The following clauses in the articles of association had reference to the same subject :—

“ 4. The Board of Directors may, upon such terms and conditions as they think fit, purchase and acquire all the business, property and liabilities of the West Hope-

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town Tea Company, Limited (now in liquidation), together with the manufactories, lands, buildings, plant, stock-in-trade, chattels and effects used in the said business, and the contracts subsisting in relation thereto, and the good-will thereof.

"12. Shares in the Company shall be allotted to such person and in such manner as the Directors shall think fit; but the Directors shall, in pursuance of an agreement made with the liquidator of the West Hopetown Tea Company, Limited (now in liquidation), allot, as therein provided, the number of shares specified in the agreement.

"13. Fully paid up shares taken by the members of the West Hopetown Tea Company, Limited (now in liquidation), in payment for the business and property, &c., of the said Company shall, for all purposes, be considered as shares on which the whole amount due has been paid in cash; and no holder of any such share shall in respect thereof be liable to pay any future sum thereon."

It was stated at the hearing of the case that an agreement to the effect mentioned in clauses 12 and 13, and in conformity with the resolution passed by the shareholders of the old Company on the 11th and 27th March, 1882, was executed; but neither the original nor any copy was produced; no trace of it was to be found at the office of the Registrar of Joint Stock Companies; and it was not stated who were the parties to its execution. Apart from the resolutions above referred to, and clause 13 of the articles of association, there was no contract of the kind mentioned in s. 28 of the Indian Companies Act, VI of 1882.

In March, 1886, the principal creditor of the Company, the Delhi and London Bank, applied, under s. 128 (*d*) of the Act, that the Company should be wound-up, and the application was granted without opposition. The winding-up proceedings were initiated in the Court of the District Judge of Saharanpur, but were transferred to the High Court as already stated (1). Owing to various causes, which need not be stated, the list of contributories did not come before the Court for settlement until April, 1888. The official liquidator, applying s. 28 of Act VI of 1882, entered upon the list all those shareholders who had been members of the old Company and who, in exchange for the property and business of that Company and in accordance with clause 13 of the articles of association of the new Company, had received shares purporting to be fully paid up, as having paid nothing upon their shares, and

(1) I. L. R., 9 ALL. 180.

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as consequently liable to contribute to the Company's assets to the full value of those shares, upon the principle laid down in *Fothergill's Case* (1), *Spargo's Case* (2), *Andress's Case* (3), *White's Case* (4) *Pagin and Gill's Case* (5), and other cases decided upon the corresponding s. 25 of the English Companies Act of 1867. The shareholders objected that the Company must be held to have been incorporated, not under Act VI of 1882, but under the former Companies Act, X of 1866, which contained no provision similar to s. 28 of the Act of 1882, and under which, therefore, contracts for the payment of shares otherwise than in cash were valid.

Mr. A. Strachey, for the official liquidator, contended that at the time when the certificate of registration was issued, the 8th July, 1882, Act X of 1866 was no longer in force, and that the Registrar had no power to grant a certificate under a repealed Act, or otherwise than under Act VI of 1882. It could not be said that, prior to the repeal, which took effect on the 1st May, 1882, there had been any "proceedings commenced" within the meaning of s. 6 of the General Clauses Act (I of 1868), so as to save the application of Act X of 1866. All that had occurred was that an application for registration was made on the 8th April, 1882, but no order or action of any kind was taken upon that application until after the 1st May, and there was no authority for the proposition that a mere application to a public officer, without any action on the part of that officer himself, fell within the description of "proceedings commenced." The nearest case was where some order had actually been passed, prior to the repeal, upon such application: *Vidya Ram v. Chandra Shekaram* (6). No action can be taken for the first time under a repealed statute, as distinguished from steps consequent upon, and for the purpose of maintaining the operation of, action previously taken. A step taken for the first time is a separate proceeding. [He also referred to *Shivram Uda Ram v. Kondiba* (7), *Ratansi Kalianji's Case* (8), and *R. v. Denton* (9)].

(1) L. R., 8 Ch. 270.

(2) L. R., 8 Ch. 407.

(3) L. R., 8 Ch. D. 128.

(4) L. R., 10 Ch. D. 720;
12 Ch. D. 511.

(5) L. R., 6 Ch. D. 381.

(6) I. L. R., 4 Bom. 163.

(7) I. L. R., 8 Bom. 340.

(8) I. L. R., 2 Bom. 148.

(9) 21 L. J. M. C. 208.

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[EDGE, C. J.—According to your argument, the proceedings could not have commenced until the certificate of registration was granted. But that was what determined the proceedings, and cannot be the act from which the commencement of the proceedings is to date.]

We say that the proceedings commenced with the Registrar's order of the 6th May, 1882, directing registration after the refund of the excess payment. That was subsequent to the repeal of Act X of 1866. Next, the letter of the 23rd June, 1882, from the Secretary and Manager, which was written nearly two months after Act VI of 1882 had come into force, at a time when the writer knew nothing had yet been done by the Registrar, was substantially a fresh application. If not a fresh application, the writer must be presumed to have known that the law had been altered since his letter of the 8th April, and his renewal of the application in June was equivalent to acquiescence in its being governed by the new law. [He referred to the observations of Jessel, M. R., in *Hastluck v. Padley* (1)].

The Hon. T. Conlan, Mr. H. Vansittart, and Mr. J. C. Mulhally, for the shareholders, contended that s. 6 of the General Clauses Act was applicable, and also s. 2(b) and s. 251 of Act VI of 1882. The certificate of registration showed, upon its face, that it was granted under Act X of 1866, and the resolutions of the 11th and 27th March, 1882, the memorandum and articles of association, all showed a clear intention that the Company should be incorporated under Act X of 1866 only. The Registrar could have no power, upon an application for incorporation under Act X of 1866, to issue a certificate under Act VI of 1882.

Mr. A. Strachey, in reply.

EDGE, C. J.—This is an application made on behalf of the liquidator of the West Hopetown Tea Company, Limited, now in liquidation, to settle a list of contributories, and to place on that list of contributories some of the original shareholders and some

other shareholders who have taken from the original shareholders by assignment or otherwise. A Company had been registered under Act XIX of 1857 bearing the same name as the present Company. That company had been registered on or about the 13th June, 1860. It was considered, advisable for certain *bona fide* reasons which we need not now go into, that the Company which had been registered under Act XIX of 1857 should be reconstructed, and that the share capital should be divided into shares of smaller amount. On the 11th March, 1882, the shareholders of the then company accordingly resolved to reconstruct the company, and on the 27th March that resolution was confirmed at an extraordinary meeting of the shareholders. The shareholders agreed amongst themselves in what proportion the shares of the new Company should be allotted, such shares representing the then existing interest of the shareholders in the assets of the Company. In pursuance of that resolution, a memorandum and articles of association were prepared and stamped, and were dated the 8th April, 1882, and on that day were forwarded by the Secretary and Manager of the then existing Company to the Registrar of Joint Stock Companies at Allahabad for registration. The Secretary's letter was as follows:—

"Dehra Dîn, 8th April, 1882.

"To the Registrar, Joint Stock Companies, Allahabad.

"Sir,—I enclose hercin the following papers:—

"1. - Duly stamped and executed memo. and articles of association of the West Hopetown Tea Company, Limited.

"2.—Treasury receipt for Rs. 225 paid into the Dehra treasury, as required under s. 17, Act X of 1868.

"3. - Treasury receipt, *vide* my No. 175, dated 1st instant.

"Kindly return the receipts to me after you have done with them and grant me a certificate of incorporation."

That application was received by the Registrar in due course of post. The question then arose in the office of the Registrar as to the amount of the stamp which should be paid, and ultimately it was ascertained that the stamp-fee which had been paid exceeded by Rs. 70 the correct stamp-fee, and an order was made on the 6th

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May, 1882, to refund the excess. The result was that prior to the 1st May, 1882, everything that was required to be done by or on behalf of the new Company to obtain its certificate of registration, under Act X of 1866 was done. They had, in fact, paid Rs. 70 in excess of the stamp which was required. Owing to delay in the office of the Registrar, and to no cause for which the applicants for registration and grant of certificate could be held responsible, the Company was not registered and the certificate was not issued until the 3rd July, 1882. On the 3rd July, 1882, the certificate of incorporation was issued under the hand of the Assistant Registrar of Joint Stock Companies of the North-Western Provinces and Oudh. It in terms purported to be granted in pursuance of Act X of 1866.

It is quite clear that the application for registration and for grant of certificate was made whilst Act X of 1866 was in force. That application was for registration and the grant of a certificate under Act X of 1866 and not under the Act of 1882, which came into force on the 1st May in that year. The Act which the parties desired the Company to be registered under was the Act which was in force at the time when they made the application, namely, Act X of 1866, and they never desired or requested to be registered under the Act of 1882. If we are to look at the certificate itself, it purports to be a certificate of registration under Act X, 1866, and not of registration under Act VI of 1882. We can have no doubt that the Assistant Registrar in issuing that certificate intended it to be a certificate of registration under Act X of 1866.

The shareholders in the old Company which was registered under Act XIX of 1857, as I have said, agreed to transfer their interest in the concern to the new Company in consideration of the paid-up shares issued to them. No contract in writing was filed with the Registrar of Joint Stock Companies under s. 28 of Act VI of 1882 at or before the issue of such shares. That is admitted on all hands here. The contention before us on behalf of the liquidator is that Act X of 1866 having expired on the 1st May, 1882, the Company must be deemed to have been registered and

the certificate of registration granted under Act VI of 1882 and not under Act X of 1866. If that contention on behalf of the liquidator were a good contention in law or in fact, the respondents before us would be liable to be placed upon the list of contributories; on the other hand, if that contention fails, it is not contested before us, on behalf of the liquidator, that the respondents before us or any of them would be liable to be placed on the list of contributories in the winding-up of the Company.

It appears to us that in deciding this case we must have regard to Act I of 1868. By s. 6 of that Act it is enacted:—"The repeal of any Statute, Act, or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation."

Act VI of 1882 was, so far as Act X of 1866 was concerned, a repealing Act within the meaning of s. 6 of Act I of 1868. It is contended on behalf of the liquidator that the application for registration and for a certificate of registration to be granted made to the Registrar of Joint Stock Companies and received by him whilst Act X of 1866 was in force, was not a commencement of proceedings within the meaning of s. 6 of Act I of 1868. On behalf of the liquidator it is further contended that no proceeding can be considered to have commenced within the meaning of s. 6 of Act I of 1868, unless and until an official or judicial order of some kind has been passed in a proceeding by an executive or judicial officer. With that contention I do not agree. It appears to me that in ordinary plain English, the proceedings for obtaining registration of this new Company, and a certificate of registration, had commenced when the application together with the memorandum and the articles of association stamped and properly drawn up were received in the office of the Registrar in April, 1882. According to the contention on behalf of the liquidator there was no commencement of proceedings at all in this case in the ordinary meaning of the term, inasmuch as no official order was made on the application until the grant of certificate. The granting of the certificate of the registration of the Company which determine

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the proceedings cannot be the act from which the commencement of the proceedings is to date. I am clearly of opinion that the proceedings for obtaining registration and a grant of a certificate of such registration of the new Company had commenced within the meaning of s. 6 of Act I of 1865 on the 12th April, 1882, and whilst Act X of 1866 was in force, and that s. 6 of Act I of 1868 applies to this case. In this view I am of opinion that we should disallow this application which has been made on behalf of the liquidator.

The only question that remains is the question of costs. I am of opinion that this is an application which was *bonâ fide* made in this liquidation, and that it is an application with regard to which we should not saddle the official liquidator personally with the payment of costs. The reasonable and proper order to be made is that the costs of each side be paid as a first charge out of the estate, and that order we, in disallowing the application, make.

STRAIGHT, J.—I am entirely of the same opinion. The application for registration was made while Act X of 1866 was in force. It is therefore to be inferred that the persons who made that application contemplated and desired that the Company should be registered under that statute. But for the delay which took place in the registration office, the registration would have been granted while the Act under which registration had been asked for was in operation, but by reason of that delay, the certificate was not granted until that Act was no longer in force. Nevertheless the certificate, which was granted on the 3rd July, was granted, as it expressly states, under Act X of 1866; and in my opinion, we should not, unless constrained to do so, hold that it was granted under Act VI of 1882. I am entirely of the same opinion as the learned Chief Justice that, for the reasons he has fully given, not only was a proceeding commenced under Act X of 1866, as interpreted by s. 6 of the General Clauses Act (I of 1888), but was carried through and completed by issue of the registration certificate of the 3rd July, 1882, in the manner contemplated by that statute. I am of the same opinion as regards the question of costs.

Application rejected.