1886.

OOKERDÁ POONSEY v. THE S. S. "SA'VITRI."

suing the owners of the other vessel for the damage which they have sustained by the collision. It is curious that the law applicable to such a case was not laid down until the year 1861. In *The Milan*(1), decided in that year, it was held that where both vessels were to blame in a case of collision, the owners of cargo in one vessel could only recover half of the damages from the owners of the other vessel. That rule has never since been disputed. It is referred to with approval in *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Co.*(2), and I will follow it in the present case. My order will, therefore, be that the plaintiffs recover from the "Sávitri" half the damages which they have sustained by the collision on the 6th January, 1883. In the Admiralty Jurisdiction of this Court we are bound to follow the practice of the Admiralty Courts in England, and as the rule there appears to be to give interest upon the damages received (3), the plaintiffs must have interest.

With regard to costs, the rule is laid down by the Court of Appeal in the case of *The City of Manchester*(4), and upon that authority I shall order that each party bear their own costs.

Attorneys for plaintiffs:—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorneys for defendants:—Messrs. *Chalk and Walker.*

(1) Lush. Adm. Rep., 388.
(2) 10 Q. B. Div., 521 at p. 538.
(3) See Williams and Bruce, p. 80; *The South Sea* in Swabey's Adm. Cas., 141.
(4) 5 Prob. Div., 3. S. C. in appeal, *ibid.*, p. 221.

ORIGINAL CIVIL

Before Mr. Justice Scott.

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED, PLAINTIFFS, *v.* DORA'BJI CURSETJI SHROFF, DEFENDANT.*

1886. *April* 20.

Company—Power of directors to deal with profits either by declaring a dividend or by appropriating to reserve fund—Power of shareholders to interfere with declaration of dividend.

The Articles of association of the B. Co. provided (*a*) that the directors might with the sanction of the company in general meeting declare a dividend; (*b*) that

* Suit No. 141 of 1886.

1886.

THE B. B. TRADING CORPORATION, LIMITED, v. DORÁBJI CURSETJI SHROFF.

the directors might, before recommending any dividend, set aside out of the profits of the company such sum as they thought proper as a reserve fund to meet contingencies or for equalising dividends, &c. The directors of the company added to the existing reserve fund a certain portion of the profits of the company for the year 1885, and thereby diminished the amount of dividend which they could otherwise have declared. Some of the shareholders disapproved of the course taken by the directors, and contended (1) that the shareholders of the company had a right by resolution to withdraw from the reserve fund a sum sufficient to enable the directors to declare a suitable dividend; (2) that they had the right to direct the directors to declare a dividend greater or less than that recommended by the directors out of the amount standing to profit and loss, including the amount so withdrawn.

Held, that under the Articles of association the contention of the shareholders could not be sustained. The reserve fund consisted of profits; and by the Articles, the disposal of profits was expressly entrusted to the directors. To allow the shareholders to deal with it would be a direct contravention of the Articles, which entrusted to the management of the directors all the business of the company. Nor could the shareholders decide the question as to the amount of dividend. By the Articles they agreed that the directors should declare the dividend, and only reserved to themselves the power to veto a dividend to which they objected. The remedy of the shareholders, if they were dissatisfied with the directors, was to remove them from office, or to alter the Articles of association.

CASE stated for the opinion of the Court under section 527 of the Civil Procedure Code (XIV of 1882). The case was stated as follows :—

"This agreement is made for the purpose of submitting for the opinion of the High Court of Judicature at Bombay, in accordance with section 527 of the Code of Civil Procedure (XIV of 1882), the question of law hereinafter stated, in which the parties hereto claim to be interested.

"2. The Articles 101 and 103 of the Corporation are as follows :—

'101.—The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares.

'103.—The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalising dividends or for repairing or maintaining the works

connected with the business of the company, or any part thereof, and the directors may invest the sum so set apart as a reserve fund upon such securities as they with the sanction of the company may select.'

"3. The Corporation contend that, according to the true construction of the said articles of association, and in particular of the articles 101 and 103 hereinbefore cited, the shareholders of the Corporation have no power to interfere with or control the exercise by the directors of the Corporation of their discretion, (*a*) as to setting aside monies to reserve under Article 103, (*b*) as to drawing out sums from the reserved fund to equalize dividends under the same Article, and (*c*) as to declaring a dividend under Article 101 otherwise than and except by withholding or refusing sanction under that article to any dividend recommended by the directors.

"4. The said Dorábji Cursetji Shroff is a shareholder of the Corporation, and contends (1) that the shareholders of the Corporation have the right, by resolution duly proposed, seconded and carried, to withdraw from the reserve fund (if adequate or that purpose) for the purpose of equalization of dividends a sum sufficient to enable the directors to declare a suitable dividend upon the year's working of the Corporation; (2) that the shareholders of the Corporation have the right to have put to the meeting a resolution directing the directors to declare a dividend (greater or less than that recommended by the directors) out of the amount standing to credit of profit and loss account, including the sum so withdrawn, which the shareholders shall consider proper to be declared out of such sum and to have such resolution (if carried) given effect to by the directors.

"5. The question of law for the opinion of the said High Court is, whether the contention of the Corporation or the contention of the said Dorábji Cursetji Shroff, as stated in the 4th paragraph hereof, is correct.

"6. It is hereby provided and agreed that upon the finding of the said High Court with respect to the said question of law, if such finding is that the said contention of the Corporation is correct, the said Dorábji Cursetji Shroff shall refrain from

1886.

THE B. B. TRADING CORPORATION, LIMITED, v. DORÁBJI CURSETJI SHROFF.

proposing any resolution or resolutions to give effect to his said contention; and that if such finding be that the said contention of the Corporation is not correct, and that of the said Dorábji Cursetji Shroff is correct, the said Dorábji Cursetji Shroff may propose a resolution or resolutions to give effect to his said contention, and that he should be afforded by the Corporation all facilities for proposing to the shareholders thereof such resolution or resolutions.

"7. The value of the property to which the said intended resolution has reference within the meaning of section 528 of the Code of Civil Procedure (XIV of 1882) is the amount of difference by way of excess between 15 per cent. on the paid-up capital of the Corporation and any higher rate of dividend determined by the shareholders of the Corporation on the said resolution being put to them."

Macpherson for the plaintiffs:—The point is, whether the shareholders at a general meeting can interfere with the discretion of the directors under Article 103. I contend that these clauses 101 and 103 invest the directors with the powers which they claim. These powers will be frustrated if the shareholders are enabled to exercise dominion over the directors.

Article 72 provides generally for the powers of the directors[1]. Neither the former Companies Act XIX of 1857, nor the new Act VI of 1882, nor the articles of Association provide that the powers given by Articles 101 and 103 are exerciseable by the shareholders. The directors cannot, without the sanction of the shareholders, declare a dividend; but the result of withhold-

(1) "LXXII.—The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the said Act XIX of 1857, or any other Act for the time being in force, for the regulation of joint stock companies, or by the regulations of the company for the time being in force, declared to be exercised by the company in general meeting, subject nevertheless to the regulations of the company for the time being in force and to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

1886.

THE B. B. TRADING CORPORATION, LIMITED, v. DORÁBJI CURSETJI SHROFF.

ing that sanction would be that no dividend would be declared. Under the Articles, the company is in the hands of the directors. So long as the directors do not exceed their powers, or commit any breach of the Articles, the question of declaring a dividend both as to time and amount is entirely for them. The company may, no doubt, alter its regulations at a general meeting. Counsel referred to *The Hydropathic Company* v. *Hampson*[1]; Palmer's Precedents, p. 157.

Farran for the defendant:—To decide the question submitted to the Court, we must assume (1) that there are profits divisible among the shareholders; (2) that the company are desirous of distributing these profits; (3) that the directors arbitrarily refuse to distribute these profits. Under these circumstances, can it be the case that the shareholders have no right to pass a resolution, in some form or other, which would control the directors? If they have not, then the directors are masters and the shareholders are their servants. Article 72 provides that the business of the company is to be managed by the directors, but the business of the company does not include the declaration of a dividend. That is separately provided for. The affairs of the company are to be managed by the directors until a profit is made, and when that profit is made it is to be separately dealt with. Dividing the profits among the shareholders is not part of the transaction of the business of the company. The shareholders have a right to deal with their own profits. I submit that Articles 101 and 103 are enabling clauses—enabling the directors to declare a dividend with the sanction of the shareholders; but they are not clauses which negative the right of the shareholders to deal with their own profits. A large sum has been set aside by them for the reserve fund, and only a small sum has been left to be distributed as profits. There is no power given to the directors to withdraw any sum from the reserve fund. That is a matter not provided for by the Articles. In such a case, the general power of the shareholders may be exercised, and they can pass a resolution directing a certain sum to be withdrawn from the reserve fund. He referred to Lindley on Partnership (4 ed.), page 591.

(1) 23 Ch. Div. 1.

1886.

THE B.B. TRADING CORPORATION, LIMITED, v. DORÁBJI CURSETJI SHROFF.

SCOTT, J. :—This is a reference to the Court, under section 527 of the Civil Procedure Code (Act XIV of 1882), for a judicial declaration of the true meaning of sections 101 and 103 of the Articles of association of the Burmah Trading Corporation. The facts which led to the reference are admitted. The directors of the company passed a portion of the profits to the reserve fund, and diminished the amount of dividend they could otherwise have declared. The defendant, representing a party among the shareholders, maintains: (1) That the shareholders have the right, by duly carried resolution, to withdraw that sum so set apart, or a part of it, from the reserve fund for the purpose of increasing the dividend; and (2) they have the right to direct the directors to declare a dividend out of the amount standing to profit and loss, including the sum so withdrawn.

The Articles of association of a company are, as Mr. Macpherson pointed out, a contract between all the shareholders to comply with the regulations contained in them. They are binding until altered in the manner provided by the Act,—that is, by a meeting duly called to pass a resolution altering them. What I have to consider is, whether the powers claimed by the defendant are to be found in the Articles. The articles in question are: (His Lordship read Articles 101 and 103 above set forth, and continued). Now, it was argued that this last Article only gave to the directors the power to set aside a portion of the profits; that it was silent as to the future application of the money; and that the inherent rights of the shareholders to deal with the property themselves where they had not expressly delegated that right to their directors, enabled the shareholders to deal with this reserve fund themselves. But I see no impediment in these rules to the directors still dealing with this sum. Their duty is to declare dividends out of profits. This sum, though set aside, was profits, and could be dealt with as profits in case the emergency for which it was retained did not occur, and out of it a subsequent dividend can be declared. If the directors had put the money out of their reach, then the shareholders could deal with it. But all the directors have done is to put the amount aside for a time.

The point may be put in this way. If this amount is profits, it can be utilized by the directors for dividends under Article 102[1], and the shareholders cannot step in as if the case had been overlooked in the Articles of association. If it is not profits, then, neither the directors nor the shareholders can apply it to the purpose of dividends at all without violating Article 102. Again, if the shareholders were to deal with it as proposed, I think their action would be a direct contravention of Article 72, which entrusts to the management of the directors all "the business of the company." I think the disposition of profits is expressly entrusted to the directors. The shareholders have chosen to delegate their powers to this body of directors, and they can only withdraw the authority in the manner provided in the Act. I am, therefore, of opinion they cannot withdraw this sum from the reserve fund without an improvement of the Articles, which are binding on them until duly and legally altered.

As regards the second point, whether the shareholders can direct the directors to declare a dividend out of the withdrawn sum, it has only a theoretical interest after my decision on the first point. But the answer is the same. The shareholders have agreed that the directors shall declare the dividends, only reserving to themselves the power of vetoing any objectionable dividend. Their remedy, if they are dissatisfied with their officers, lies only in the legal displacement of the directors, or in the legal alteration of the Articles.

Attorneys for the plaintiffs:—Messrs. *Crawie, Lynch and Owen.*

Attorneys for the defendant:—Messrs. *Ardeshir and Hormasji.*

(1) Article 102.—"No dividend shall be payable except out of the profits arising from the business of the company."