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the wife. But here the wife purchased property in her own name out of her husband's money, and even if there were any presumption of advancement, it is rebutted by the evidence in, and circumstances of the case.

I find in the affirmative on the first issue; in the negative on the second; in the second defendant's favour on the third; in the negative on the fourth and fifth. I reject the claim. The second defendant to recover his costs from both the next friend of the plaintiff and the first defendant, because, in my opinion, the first defendant is the real mover of this litigation.

*Suit dismissed.*

Attorneys for plaintiff—*Messrs. Sorabji and Jehangir.*

Attorneys for defendants—*Messrs. Mansukhlal, Jamsetji and Hiralal.*

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## ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.*

IN THE MATTER OF THE BOMBAY BURMAH TRADING CORPORATION, LIMITED.

1902.
*October* 17.

*Company—Articles of Association—General meeting of shareholders—Proxies—Qualification of proxy—Memorandum of Association—Alteration of Memorandum of Association—Act XII of 1895.*

The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending on the contract between them and other parties, then all the requisitions of the contract as to the exercise of that right must be followed.

Article 65 of the Articles of Association of the Bombay Burmah Trading Corporation, Limited, provided as follows: "No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company."

*Held*, that the above article imposed two essential conditions, viz., that the proxy should be a shareholder at the date of his appointment and also at the date when he acted.

By a power-of-attorney dated 14th October, 1881, some of the shareholders in the above Company authorized and appointed certain specified persons "and all persons who at any time during the continuance of these powers-of-attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted.....and in the absence from Bombay" of all the said persons, "then the person or persons for the time being holding the

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procuration of the said firm, and managing the said business jointly and each of them severally" to vote as proxy for them at meetings of the above Company. On the 20th March, 1889, M. became a shareholder in the Company, and on the 1st April, 1889, he began to manage the business of Wallace & Co., holding its procuration. Under the above power he voted as proxy at meetings of the Company held in 1902 for the purpose of altering the Memorandum of Association.

*Held*, that, not having been a shareholder at the date of his appointment as required by article 65, he had not been validly appointed a proxy.

It is not necessary that the actual name of the person appointed to be proxy should appear in the proxy paper. It suffices if he is designated by a description which fixes his identity at the date of appointment.

PETITION for the confirmation of a special resolution of the Company effecting an alteration in the Memorandum of Association under the Indian Companies (Memorandum of Association) Act (XII of 1895).

The Bombay Burmah Trading Corporation, Limited, was incorporated on the 4th September, 1863, under the Indian Companies Act (XIX of 1857). Its name then was "The Burmah Trading Company," but that name was afterwards altered by resolution dated the 30th April, 1864.

The registered office of the Company was situate in Bombay.

In 1896 the Memorandum of Association was altered with the sanction of the Court, and the third clause thereof as then framed ran as follows:

3. The objects for which the Company is established are:

By and through the means of Messrs. Wallace & Co. of Bombay, Merchants, who shall at their option be the perpetual Secretaries, Treasurers and Managers of the Company, of whatever member or members that firm may for the time being consist, or by or through the means of other the Secretaries, Treasurers and Managers for the time being of this Company, to carry on trade with and at Burmah, Siam, Cochin-China, India, the Malay or Eastern Archipelago, Japan, Hongkong, and the Chinese Treaty Ports, but especially the timber and petroleum trades in all their branches, including treating and preparing for the market, and for the purposes aforesaid to purchase or take on lease and work forests or tracts of timber and to purchase or take on lease, hire or otherwise acquire or construct land, mills, buildings, easements, oil-fields, concessions, property and rights of all kinds, and to work, plant, develop, sell or otherwise turn the same to account, and also to purchase or otherwise acquire or construct manufactories for the purposes of the Company's oil business only, also to charter, purchase or construct ships and boats for the conveyance of the Company's goods or merchandise, to purchase timber, the product of any of the

countries aforesaid, from other shippers or holders of the same either on account of the Company itself or on joint account with such shippers or holders, also to carry on the business of Commission Agents without advance, and to enter into any arrangement for sharing profits or for joint adventure, co-operation, or partnership in the Company's timber trade with any person, partnership or company carrying on or engaged in or about to carry on or engage in any business or transaction in timber, which this Company is authorised to carry on or engage in, and to form and establish Joint Stock Companies or partnerships for the purpose only of carrying on partly or wholly the petroleum trade of the Company, and to take or otherwise acquire and hold any fully paid up shares, stocks or securities of such companies or partnerships, and generally to do all such things as are incidental or conducive to the attainment of the above objects.

In 1902 it was proposed that the above clause should be deleted and the following objects clause substituted for it:

The objects for which the Company is established are:

By and through the means of Messrs. Wallace & Co., of Bombay, Merchants, who shall at their option be the perpetual Secretaries, Treasurers and Managers of the Company, of whatever member or members that firm may for the time being consist, or by or through the means of other the Secretaries, Treasurers and Managers for the time being to carry on trade and business with and at Burmah and the rest of India and the East, and in particular to buy, sell, get, produce, prepare for market, manufacture, import, export and deal in any part of the world in timber, oil, minerals and other products of Burmah, India and the East, and to purchase, construct, take on lease or otherwise acquire and to work, develop, plant or otherwise turn to account land, mines, mills, manufactories, buildings, easements, ships and boats, concessions, business and property and rights of all kinds, and to carry out all or any such objects either on account of the Company itself or on commission or otherwise on behalf of any person or association of persons or Company, and to enter into any arrangement for sharing profits, joint adventure or co-operation or partnership with and to assist any person, partnership or company carrying on or engaged in or about to carry on or engage in any business or transaction which this Company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this Company, and to take or otherwise acquire and hold shares or stocks in or securities of and to form and establish any such company or partnership or business, and to sell, improve, manage, develop, exchange, lease, mortgage, charge, dispose of, turn to account or otherwise deal with all or any of the property and rights of the Company for the time being, and to do all such other things as are incidental or conducive to the attainment of the above objects.

At an extraordinary general meeting of the shareholders held at the registered office on the 29th May, 1902, a special resolution to the above effect was proposed and seconded, but on

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being put to the meeting, the Chairman declared it lost on a show of hands.

A poll was thereupon demanded, and on being taken there were 872 votes in favour of the resolution and 223 against. The Chairman thereupon declared the resolution carried.

At a second extraordinary general meeting of the shareholders held on the 19th June, 1902, the above resolution was submitted for confirmation as a special resolution, and on a poll being taken it was carried, the voting being 844 in favour of the resolution and 301 against it. The greater number of votes were given by proxy.

The Company subsequently presented a petition to the High Court, setting forth the nature and objects of the proposed alteration of the Memorandum of Association, and praying that the said special resolution should be confirmed pursuant to the Indian Companies (Memorandum of Association) Act (XII of 1895).

It appeared that the Chairman of the meeting (Mr. R. H. Macaulay) recorded 316 votes in favour of the resolution as proxy for absent shareholders. The instrument under which he acted was a power-of-attorney dated the 14th October, 1881, and was as follows:

> Know all men by these presents that I, .....of....., do hereby nominate, constitute and appoint.....and all persons who at any time during the continuance of this power-of-attorney may be partners in the firm of Wallace & Co., of Bombay, howsoever that firm may be constituted, and....., Assistants in the said firm, and in the absence from Bombay of all the said persons, then the persons or person for the time being holding the procuration of the said firm and managing the said business jointly and each of them severally, to be my attorneys or attorney for me and on my behalf.....and to be my proxy to vote for me and on my behalf at any meeting or meetings of the said existing corporation or any such new corporation to be formed as aforesaid during the continuance of this power.

At the date of the above instrument Mr. Macaulay was not a shareholder in the Company, nor did he at that time manage the business or hold the procuration of the firm of Wallace & Co., Bombay. He first became a shareholder in the Company on the 20th March, 1889, and he became empowered to sign for the firm on the 1st April, 1889.

The following were the Articles of Association of the Company relating to votes by proxy:

62. Votes may be given either personally or by proxy.

63. The instrument appointing proxy shall be in writing, under the hand of the appointor, or, if such appointor is a corporation, under their common seal, and shall be attested by one or more witnesses.

64. Every instrument appointing a proxy may be in the following form, or as nearly therein as may be :

I.....of.....in..... .....being a shareholder in the Bombay Burmah Trading Corporation, Limited, and entitled to.....vote (or.....votes) hereby appoint .....of..... .....as my proxy to vote for me and on my behalf at the ordinary or extraordinary (*as the case may be*) General Meeting of the Company, to be held on the.....day of.....and at any adjournment thereof (or at any meeting of the Company that may be held in the year.....) (*or* and at all other General Meetings of the said Company until I shall revoke this authority). As witness my hand this..... day of.....

Signed by the said .....in the presence of.....

65. No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company.

66. No person shall be allowed to vote or act as a proxy at any meeting unless the instrument appointing him shall have been deposited at the registered office of the Company not less than forty-eight hours before the time for holding the meeting at which the person named in such instrument proposes to vote.

67. Unless the instrument appointing the proxy shall otherwise indicate, the proxy thereby appointed shall be deemed to be a continuing proxy and shall be entitled to act as such until his appointment shall be revoked by instrument in writing deposited at the registered office of the Company.

*Lowndes, Bayley* and *Young* for the Company.

*Branson* for the opponents.

The following authorities were cited:—*In re Parrott*: *Ex parte Cullen*[1]; *Seal* v. *Claridge*[2]; *Harben* v. *Phillips*[3]; *Tofaluddi* v. *Mahar Ali*[4]; *Ex parte Evans*: *In re Baum*[5]; *Seale Hayne* v. *Jodrell*[6]; *Bromley* v. *Wright*[7]; *Forester* v. *New Land Diamond Mines*.[8]

(1) (1891) 2 Q. B. 151.
(2) (1881) 7 Q. B. D. 516.
(3) (1883) 23 Ch. D. 14.
(4) (1898) 26 Cal. 78.
(5) (1880) 13 Ch. D. 424.
(6) (1891) Ap. Ca. 304 at p. 306.
(7) (1849) 7 Hare 334, 340.
(8) (1902) 18 Times Law Rep. 497.

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JENKINS, C.J.:—The Burmah Trading Corporation, Limited, has presented a petition to this Court under the Indian Companies (Memorandum of Association) Act, 1895, asking that an alteration in its Memorandum of Association, effected by special resolution, may be confirmed by the Court. As the learned Judge, to whom this class of business is ordinarily assigned, is disqualified by interest from dealing with the petition, its hearing has been transferred to the present Bench.

The petition is opposed both on its merits, and on the ground that the special resolution has not been passed according to law. Before the case can be dealt with on its merits considerable amplification of the evidence appears to us necessary, and though we are prepared to give the parties an opportunity under the circumstances to remedy this defect, we have been asked in the first place to deal with the respondent's objection to the validity of the resolution. This accordingly we now propose to do.

Though many objections are formulated in the respondent's affidavit, before us they have been narrowed to three, and to these I will limit my remarks. To understand them a few facts must be stated.

The resolution was first submitted to a meeting of the Company on the 29th of May, 1902, and, according to the report of the scrutineers, the resolution was passed by the requisite majority. Of these 814 votes, two lots, amounting to 124 and 192, which for the purposes of this case may be conveniently classed together, were recorded, if at all, by Mr. Macaulay, the Chairman of the meeting, as proxy for absent shareholders. It is conceded on both sides that, if those votes are to be counted, the resolution was passed, but that, if they are not, then it was lost.

The arguments consequently have been limited to a discussion on the validity of these votes.

Now, the first argument urged against them is that they in fact were never recorded. Though there may have been an absence of formality, I think there is no doubt that Mr. Macaulay intended to vote, and in fact did vote, as a proxy: the proxy papers, under which he purported to act, were placed in

the basket appropriated to the votes in favour of the resolution: the proxy papers in opposition to the resolution were placed in another basket: and the scrutineers in the presence of Mr. Shroff, who practically was the representative of the dissentients, treated the votes represented by the proxy papers as properly given, without any protest. Had objection been taken at the time, any want of formality might have been, and doubtless would have been, remedied, and it would not under these circumstances be right to treat the votes as not actually given. The articles impose no particular procedure, and the course followed was, in my opinion, sufficient for the purpose of the poll then being taken. Therefore, this objection cannot prevail.

Then it is said that the proxy papers were not properly attested, but this objection only applies to 124 of the votes which were attested by Mr. Wallace. The 63rd of the Company's Articles of Association provides that the instrument appointing a proxy shall be attested by one or more witness or witnesses, and it is argued that this provision has not been observed, on the ground that Mr. Wallace was incompetent to attest, inasmuch as he was by the document appointed a proxy: *In re Parrott*.[1]

But to this it is answered, that one attesting witness suffices, and that this requirement has been observed, because, even if Mr. Wallace's attestation was invalid, there has been a good attestation by Mr. Doggett. In my opinion this is a good answer, for Mr. Doggett was none the less an attesting witness because he also was a certifying notary, and reading his notarial attestation I think the proxy paper was attested by him within the meaning of Article 63.

This brings me to the far more serious question, whether Mr. Macaulay's appointment as a proxy was in compliance with the Articles of Association. We have to be satisfied on this point, for, as stated in *Harben* v. *Phillips*,[2] the right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending upon the contract between them and other parties, there all the requisitions of the contract as to the exercise of that right must be followed.

(1) (1831) 2 Q. B. 151 at p. 153.

(2) (1883) 23 Ch. D. 14.

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Now the objections urged under this head are, that there is no such proxy paper as the articles require, and that Mr. Macaulay had not the requisite qualification for his appointment. The force of these objections must be determined by Articles 62 to 67, which for this purpose must be read together. I am not prepared to say, notwithstanding the phraseology of Article 66, that the actual name of the appointed must appear in the proxy paper: I think it would suffice if he were designated by a description, which would fix his identity at the date of the appointment. But we have far more to reckon with here. Article 65 imposes two conditions: the proxy must be a shareholder at the date of his appointment and at the date when he acts. That both these conditions are essential is, I think, made the more apparent when the language of the article is contrasted with that of clause 44 of Table B to Act XIX of 1857. At the time of his voting Mr. Macaulay was a shareholder: the question is whether the other condition of the article has been satisfied.

Then again the instrument under which Mr. Macaulay purports to have acted is not in the form expressly sanctioned by the Articles of Association: it is a power-of-attorney, not limited to an authority to vote, but providing for a variety of other matters. So far as it relates to the power to vote it runs as follows:

> Know all men by these presents that I.....of .....do hereby nominate, constitute and appoint Lewis Alexander Wallace, Alexander Falconer Wallace, John Annon Bryce, Henry Adair Richardson, and Michael Russell Dyer, and all persons who at any time during the continuance of this Power of Attorney may be partners in the firm of Wallace & Co. of Bombay, howsoever that firm may be constituted, and Frederick Liddell Steel and William Robert Macdonell, Assistants in the said firm, and in the absence from Bombay of all the said persons then the persons or person for the time being holding the procuration of the said firm and managing the said business jointly and each of them severally to be my attorneys or attorney for me and on my behalf.....and to be my proxy to vote for me and on my behalf at any meeting or meetings of the said existing corporation or any such new corporation to be formed as aforesaid during the continuance of this power.

The instrument is dated the 14th day of October, 1881.

Now it will be seen that Mr. Macaulay was not appointed by name: had he been, his appointment would certainly have been bad, for at the date of the instrument he was not a shareholder. It is stated before us that he first became a shareholder on the

20th of March, 1889, and that he first came within the descriptions contained in the power of attorney on the 1st of April following; for it was not until then that he held the procuration of the firm and managed the business in the absence of all partners of the firm from Bombay. Therefore, it is argued, the article is satisfied, for when the power-of-attorney came into operation as to him, he was a shareholder.

But the article prescribes the qualification at the time when the appointment is made, not at any subsequent date to which the operation of the instrument may be postponed, and an appointment is none the less made at its date because its operation is suspended. The appointment is of all persons answering a particular description, irrespective of the qualification the article imposes, and there is nothing in the articles, nor has it been suggested that there is elsewhere, a provision, as a result of which the possession of shares in the Company is an inseparable incident of the description contained in the power.

Can it then be said that the requisitions of the articles have been observed? Read together they appear to me to contemplate the appointment of no one but ascertained individuals holding the prescribed qualification at the date of the instrument, and not an appointment such as we have here, whereby a number of persons, some ascertained and some not, some at the time qualified and some not, are vested with authority to vote, without any exhaustive attempt at selection between them, and without any limit as to time except the continuance of the firm of Wallace & Co., howsoever that firm may at any time be constituted.

No practical difficulty has arisen in this case, but it is easy to see that the Company might be seriously embarrassed if an instrument like the present were treated as a compliance with its article; for if good for one it would be good for all. Under the power several persons are expressed to be vested with authority to vote at one and the same time, and in some cases without indication of preference, so it is manifest that if there were a difference of view among the several would-be proxies, and each claimed to vote, serious difficulties would arise, and the Company might be thereby hampered in the conduct of its affairs.

I think, therefore, the instrument does not comply with the Company's articles, and further that Mr. Macaulay, for want of

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proper qualification, has not been validly appointed a proxy, and as a result I hold that the resolution has not been passed by the requisite majority. The objection of insufficient stamping has not been pressed before us, for under the Indian Stamp Act the votes would not on that ground be void.

The result, however, is that the petition must be dismissed with costs, but we can only allow Mr. Shroff half his costs of the first affidavit, as it appears to us needlessly prolix.

BATTY, J.:—Inasmuch as the right to vote by proxy is not a right claimable under the ordinary law, but is derived from the terms of the "Articles of Association," it is essential that the conditions imposed by those articles should be strictly fulfilled.

Article 65 runs as follows: "No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company."

This, in its plain grammatical meaning, seems to require that the prescribed qualification must exist both at the time when the appointment is made and also at the time when the authority to act under it is exercised. Such a construction would, of course, be fatal to an appointment *in futuro* of a person not qualified *in præsenti*.

The alternative suggested is that if a person, not a shareholder at the date of the instrument appointing him, becomes a shareholder at the moment when that instrument, so far as he is concerned, comes into operation, there is a substantial compliance with the rule. That construction would in effect substitute for the words "no person shall be appointed" the words "no person appointed shall have authority to act as a proxy." It assumes an intention not expressed in the article or arising by necessary implication from the circumstances. If it were correct, the words "shall have authority to act as proxy" would have sufficed. The words "no person shall be appointed" would then be redundant and unmeaning. But there is nothing to justify the assumption that those words were retained *per incuriam*. For the article was advisedly adopted in lieu of the model supplied by the Legislature in No. 44 of Schedule B to the Act (XIX of 1857) then in force. And there is no apparent reason for supposing that the requirement relating to the appointment, was

deemed less essential than the requirement relating to the exercise of the authority thereby conferred. To hold, therefore, that the real intention was only to insist on the prescribed qualification when the appointment came into operation, is not justified by the plain meaning of the words used. The circumstances in which the articles were drafted would, if it be permissible in such case to speculate as to the intention, induce the contrary conclusion. For the articles were prepared to exclude and replace those in the Schedule B to the Act which would otherwise have applied. It would seem, therefore, legitimate to infer that those who framed the articles had that schedule under consideration and intended to express all deviations from its essential principles with precision. No. 44 of the schedule expressly provides that no instrument appointing a proxy shall be valid after the expiration of one month from the date of its execution. This time limit was discarded. But no further departure from No. 44 was allowed, and article 65 deliberately retained the provision restricting the selection of proxies to shareholders *in esse* at time of the appointment, precluding appointments of suspended validity.

But even if the articles be read apart from all extrinsic indications as to intention, is it possible, in applying the strict principle of construction followed in *Harben* v. *Phillips*,[1] to infer that it was the intention in article 64 and article 65 to authorise the appointment of a person who did not possess the prescribed qualifications till nearly ten years after the date of the instrument appointing him? To construe those articles with such latitude would be to deprive the terms of the agreement binding on the shareholders of all certainty. If a meaning so remote from that which is expressed could be imported into the articles, it would, I think, tend to destroy the confidence which the shareholders of companies are entitled to place in the binding force of "Articles of Association."

*Petition dismissed.*

Attorneys for the petitioner—*Messrs. Craigie, Lynch & Owen.*

Attorneys for the opponents—*Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

(1) (1883) 23 Ch. D. 14.