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income is found with the beneficiary, then the beneficiary is primarily liable to be taxed, and if the income is found with the trustee, then it is the trustee who is liable.

I agree, therefore, that the questions should be answered in the way proposed by my Lord the Chief Justice.

Rangnekar J.

Answers accordingly.

Y. V. D.

ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

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THE PERFORMING RIGHT SOCIETY LTD., PLAINTIFFS *v.* THE INDIAN MORNING POST RESTAURANT (A FIRM), DEFENDANT.*

Power-of-attorney—Proof of—Authentication by a Notary Public—Presumption under s. 85, Evidence Act (I of 1872)—Civil Procedure Code (Act V of 1908), O. III, r. 2—Attorney of High Court with general power-of-attorney, whether a recognised Agent—Verification of plaint by constituted attorney—Whether proper verification.

When a power-of-attorney executed before and authenticated by a Notary Public is produced, it is open to the Court under s. 85 of the Indian Evidence Act to presume that all the necessary requirements for the proper execution of the power-of-attorney have been duly fulfilled.

A certificate annexed to the power-of-attorney by the Notary Public is proof of the facts therein certified.

An attorney of the High Court holding a general or a special power-of-attorney is a recognised agent of the party under O. III, r. 2 (*a*), and can act for him.

Order XXIX, r. 1, is an enabling rule and it does not exclude the operation of O. VI, rr. 14 and 15; accordingly a plaint duly signed and verified by a constituted attorney of the party is properly signed and verified.

SUIT for injunction and damages for infringement of copyright.

The plaintiffs were the owners of the copyright in a musical composition called Classica which copyright was still subsisting. As such owners they had granted a licence

*O. C. J. Suit No. 781 of 1937.

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to the Secretary of State for India in Council, who owned and controlled certain broadcasting stations in India and organised and conducted the same under the name of The Indian State Broadcasting Service, to perform and/or broadcast or cause or allow to be performed and/or broadcasted publicly and by any means whatsoever at or from the Broadcasting Stations of the Indian Broadcasting Service . . . all or any of such works as at any time during the subsistance of the licence were included in the repertoire of the Society . . . and which the licensee may elect to perform and/or broadcast. By clause 2 of the licence it was provided that the license authorised the audition or reception . . . for domestic or private use only.

The defendant firm had a licence from the Director General of Posts and Telegraphs to establish a wireless receiver and one loud-speaker in the public rooms at the Indian Morning Post Restaurant. The licence was subject *inter alia* to the following condition :—

"The licence does not authorise the licensee to do any act which is (*a*) an infringement of any copyright which may exist in the matter received by the station . . . "

On March 23, 1937, the musical composition "Classica" was broadcast between 1 p.m. and 2 p.m. from the Bombay Station and was received at the defendant's restaurant for the entertainment of his patrons.

The plaintiffs on May 18, 1937, filed the suit against the defendants alleging an infringement of their copyright by the defendants and asked for an injunction restraining the defendants, their servants and agents from performing or causing to be performed or authorising the performance of the said musical work or any part thereof in public without the plaintiffs' written consent and for damages for the breach of the copyright.

The plaint was signed and declared by Mr. C. M. Eastley, the constituted attorney of the plaintiffs. Mr. C. M. Eastley was a member of the firm of Messrs. Little & Co., attorneys for the plaintiffs. The general power-of-attorney

under which Mr. C. M. Eastley acted was given on March 10, 1932, by the plaintiffs in favour of the members of the firm of Messrs. Little & Co. and the seal of the plaintiffs was affixed to the power-of-attorney by virtue of a resolution of the board of directors of the plaintiffs' Company. The certificate annexed to the power-of-attorney by the Notary Public stated that it was executed in his presence in pursuance of a resolution of the Board of Directors and in the presence of two of the Directors of the Company and its secretary.

The defendants at the trial before Mr. Justice B. J. Wadia gave up :—

(1) Their contention that the "Classica" could not form the subject of copyright and

(2) Their denial that the copyright still subsisted or that it vested in the plaintiffs but denied the infringement alleged in the plaint and raised the following three issues of law as arising on the frame of the suit, the decisions of which alone concern this report—

(*a*) Whether Mr. C. M. Eastley is the constituted attorney of the plaintiff,

(*b*) Whether Mr. C. M. Eastley is the recognised agent of the plaintiff, and

(*c*) Whether the plaint is properly signed and verified.

Khandalawala, for the plaintiff.

Forbes, for the defendant.

B. J. WADIA J. This is a suit in respect of an alleged infringement of copyright. Plaintiffs are a company having their registered office in London and are the present owners of a copyright in a musical work or composition called "Classica", which copyright is still subsisting. They allege that the defendants infringed that copyright on March 23, 1937, by either performing the musical work or causing it to be performed on their premises without the plaintiffs' knowledge and consent. Plaintiffs have accordingly filed this

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suit for an injunction and damages through their constituted attorney Mr. Charles Mortimer Eastley, a partner of the firm of Messrs. Little & Co., attorneys of this Court.

The defendants contended at first that the musical composition "Classica" could not form the subject-matter of a copyright, and a commission was accordingly issued to England to take evidence on the point. That contention was, however, abandoned at the hearing. Defendants further denied that the copyright still subsisted or was vested in the plaintiffs, but that contention has also been given up, and no issue has been framed on it. Defendants only deny the alleged infringement on March 23, and accordingly deny liability. They have, however, raised three issues with regard to the frame of the suit which I will first deal with.

The first issue is whether Mr. C. M. Eastley is the constituted attorney of the plaintiffs. The power-of-attorney under which the suit is filed is dated March 10, 1932, and is given in favour of the members of the firm of Messrs. Little & Co., plaintiffs' attorneys, including Mr. C. M. Eastley. It is a general power-of-attorney, and has been put in as Exhibit 1. The power is given under the seal of the Company which is affixed at the end, but defendants' counsel argued that under art. 48 of the Articles of Association of the Company the seal of the Company could not be affixed to any instrument except by the authority of a resolution of the Directors and in the presence of at least two Directors and the Secretary or such other person as the Board of Directors may appoint for the purpose, and that such resolution has not been produced. A true copy of the resolution was, however, produced and shown to the Court. The power-of-attorney is given under the seal of a Notary Public of the city of London, and has been duly executed and attested. Under s. 85 of the Indian Evidence Act the Court shall presume that a power-of-attorney executed before, and authenticated by, a Notary Public, was so executed and authenticated.

The provision is mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power-of-attorney have been duly fulfilled. I may further point out that under s. 57 (*6*) of the Indian Evidence Act the Court shall take judicial notice of, *inter alia*, all seals of Notaries Public. It has also been held in *In re Sladen*[1] that there are different legal modes of executing a power-of-attorney, and that the provision of s. 85 was not exhaustive. There is a certificate annexed to the power-of-attorney in suit by the Notary Public in which he says that the common seal of the plaintiff Company had been affixed to the power, and that it was executed in his presence in pursuance of a resolution of the Board of Directors and in the presence of two Directors of the Company and its Secretary. In my opinion, the power-of-attorney is properly executed, and I, therefore, answer issue No. 1 in the affirmative.

The second issue is whether Mr. Eastley is the recognised agent of the plaintiffs. It is provided by O. III, r. 1, of the Civil Procedure Code that any appearance, application or act in or to any Court, required or authorised by law, may be done by the party in person, or by his recognised agent. Under O. III, r. 2, the recognised agents of parties by whom such appearances, applications and acts may be made or done are amongst others persons holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties. The word "general" preceding the words "powers-of-attorney" in s. 37 of the old Code of 1882 was omitted in O. III, r. 2, and the clause making specific provision for *Mukhtears* in that section has also been deleted. The result was that O. III, r. 2 (*a*), as it originally stood, authorised any person holding a power-of-attorney to act or make applications or appearances in Court. The rule, however, has been amended from time to time ; but it is not necessary to discuss the different amendments in this

[1] (1898) 21 Mad. 492.

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place. The present amendment in force which is applicable runs as follows :—

(*a*) "Persons holding on behalf of such parties either (*i*) a general power-of-attorney, or (*ii*) in the case of proceedings in the High Court of Bombay an Attorney of such High Court . . . , holding the requisite special power-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them or him to make and do such appearances, applications and acts on behalf of such parties."

It was argued that the two parts of this amended rule were disjunctive, and the power-of-attorney under which an attorney of the High Court could act in High Court proceedings could only be a special power-of-attorney and no other. The word "persons" in the first part of the amendment is comprehensive, and does not exclude an attorney of the High Court. What is meant under the second part is that an attorney of the High Court of Bombay can also appear under a special power-of-attorney. It is a person who is not an attorney who can only act for a party under a general power-of-attorney. It was pointed out that it was not clearly stated in part two that the special power-of-attorney was in addition to a general power-of-attorney under which an attorney could act. The rule is not clearly worded. But if it had been the intention of the makers of the amended rule to restrict an attorney only to a special power-of-attorney, it would have been provided specifically that an attorney of the Court could only act under a special power-of-attorney and no other. The words "requisite special power-of-attorney" do not mean that only a special power-of-attorney is required. They mean that the special power-of-attorney must be a proper power. If an attorney could not act also under a general power-of-attorney, a great deal of inconvenience would arise if the attorney who had to file suits on behalf of an absent party and to make interlocutory applications immediately was to wait to get a special power-of-attorney in every case. Defendants' counsel argued that a general power-of-attorney might be easily abused by an

attorney who might be tempted to file suit after suit without reference to the party. But to that the answer is that a general power-of-attorney need not be given to the attorney if the party does not so wish. In my opinion, therefore, an attorney of this Court can act both under a general as well as a special power-of-attorney, but a person who is not an attorney can act only under a general power. I, therefore, hold that Mr. Eastley is the recognised agent of the plaintiffs, and would answer issue No. 2 also in the affirmative.

The third issue is whether the plaint is properly signed and verified. My attention was drawn to O. XXIX, r. 1, of the Code under which suits by a corporation may be signed and verified on its behalf by the Secretary or by any Director or other principal officer of the corporation who is able to depose to the facts of the case. It was argued that this plaint had not been verified by a person who would fall under any one of these categories. It has, however, been held by the Appeal Court in *Calico Printers' Association, Ltd.* v. *Karim & Bros.*,[1] that O. XXIX, r. 1, is a permissive rule and does not exclude the operation of O. VI, rr. 14 and 15 of the Code. That case was also followed by Rangnekar J. in *Bundi Portland Cement Limited* v. *Abdul Hussein Essaji*.[2] Under O. VI, r. 14, every pleading shall be signed by the party and his pleader (if any): provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. The plaint has been signed by Mr. Eastley as the constituted attorney of the plaintiffs, and I have already held that his appointment as such is valid and that he is the recognised agent of the plaintiffs. It is provided by O. VI, r. 15, that every pleading shall be verified at the foot by the party or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. It is further

[1] (1930) 55 Bom. 151.

[2] (1935) 38 Bom. L. R. 894.

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provided that the person verifying shall specify by reference to the particular paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true. There is nothing in this rule which prevents the person verifying from saying that the whole plaint is upon information received and believed to be true. That has been done, and I would therefore also answer issue No. 3 in the affirmative.

[His Lordship then dealt with the merits of the case and found as a fact that there was an infringement of the copyright and granted the injunction prayed for and awarded Rs. 50 as damages for the breach.]

Decree accordingly.

N. K. A.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

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GANESH VISHNU VIJAPURE (ORIGINAL DEFENDANT), APPELLANT *v.* KASHINATH THAKUJI JADHAV (ORIGINAL PLAINTIFF), RESPONDENT.*

Specific Relief Act (1 of 1877), s. 42—Suit for declaration—Injunction, essence of relief claimed—Injunction not prayed for in plaint—Suit not competent.

One K filed a suit against R to recover a debt and obtained an order for attachment before judgment of R's press. At a later date in the same year G filed a suit against R and obtained a decree based on an award and in execution of the decree attached R's press. K, therefore, filed a suit against G for a declaration that the decree obtained by G against R was fraudulent and collusive and that G was not entitled to attach the property which K had previously attached. The Subordinate Judge held that G's decree was fraudulent and collusive and made a declaration that the press attached by K was not liable to be attached and sold in execution of the decree obtained by G. On appeal to the High Court,

Held, dismissing K's suit, that the relief which K really required was an injunction to restrain G from attaching the property, and not merely a declaration of title as claimed by K and therefore the suit was not competent under s. 42 of the Specific Relief Act, 1877.

Venkatarama Aiyar v. *The South Indian Bank, Limited*[1] and *Jamnabai* v. *Dattatraya*,[2] referred to.

*First Appeal No. 167 of 1936.

[1] (1919) 43 Mad. 381.

[2] (1935) 60 Bom. 226.