

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Leishman v. Cochrane, from the Supreme Court of the Island of Mauritius. Report dated July 27, 1863.*

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Present:

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THIS is an Appeal from an Order subjecting the Defendant to certain payments assessed upon the shareholders of a Registered Company in Calcutta, and from some preliminary Orders in the suit.

A Company called the Asiatic Marine Insurance Company was established in Calcutta in 1847 for five years, which expired on the 31st May, 1852.

In this Company the Defendant was a shareholder, and he was also Agent for the Company in the Mauritius.

A gentleman named Ferguson was also a shareholder in this Company, and Agent for it in Calcutta.

In 1850 the Legislative Act for the regulation of Registered Joint Stock Companies in India was passed.

In November 1851 the following prospectus was issued of a renewed Company, to take the business of the old:—

“ No. 54.

“ ASIATIC MARINE INSURANCE OFFICE, CALCUTTA.

“ November, one thousand eight hundred and fifty-one.

“ The present term of the Asiatic Marine Insurance Office. 1847-52, will expire on the thirty-first day of May next, and it is proposed to renew the office on the following basis:—

“ 1st. The Office to be formed for a term of five years, and to consist of 100 shares of 1,000 rupees each.

“ 2nd. No dividend to be declared for three years, or until the capital has been increased to three times the original amount by the addition of profits.

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" 3rd. The management, as far as regards accounts and the division of profits, to be in Calcutta, but each shareholder to have the right to give a proxy, so that he may be fully represented in all cases.

" 4th. Business not to be commenced until sixty-six shares are taken,

" 5th. The Company to be registered in the Supreme Court of Calcutta under Act XLIII of 1850, so that it can sue and be sued in the name of the registered officer, and shareholders have all the advantages of control, &c., provided by that Act.

(Signed) "W. F. FERGUSSON, *Secretary.*"

This Company was formed and registered. Ferguson was a shareholder in the new Company, and Secretary to it.

The Defendant was Agent for it in Mauritius. This is not disputed, and his name was entered in the list of shareholders; the deed being executed in his name by Ferguson, as his Attorney.

The Legislative Act provides that on an application to the Supreme Court for Registration of any Company, there shall be produced the deed of partnership, or a copy and a list of the Directors and Shareholders of the Company, verified by the affidavit of the Secretary or Manager.

And that within a week before or after 1st January and 1st July in each year, a Memorial shall be placed in the Court in which the Company is registered, setting forth in alphabetical order the names of all the partners, with their several additions, places of abode, and the names of the Directors.

These Memorials are to be signed by two or more of the Directors, and verified by the affidavits of one or more of them before the Master of the Supreme Court or a Commissioner appointed by the Court.

The 13th section provides that an office copy of such registered deed, or copy thereof filed as aforesaid, or a memorial thereof or of any part thereof, is to be received in evidence before all Courts; and by the 16th section any persons are to be at liberty to inspect any such deed, copy, or memorial, and the officer of the Court is to supply copies under the seal of the Court to any persons applying for the same.

Provisions are contained in the Act for the winding up of Companies in case of what is termed a forfeiture, or declaration of insolvency. The assets are to be vested in the official assignee. The sums

required for payment of the debts are to be assessed by him on the shareholders, and orders are to be made by the Supreme Court for payment of the sums so ordered; and the shareholders whose names are on the last general Memorial are to be liable, in the first instance, to pay the debts of the Company.

It must be presumed that Memorials were filed according to the Act, that is, two Memorials in each year; the last of such Memorials was filed on the 6th July, 1855.

This Memorial was signed by two Directors, and was verified by the affidavit of one of them, Manackjee Rustomjee, which stated that the paper writing annexed, marked A, contained a true and correct list, in alphabetical order, of the names of the partners in the Asiatic Marine Insurance Office, together with their several additions and places of abode, and also the number of shares belonging to each of the said partners, and also a true and correct list of the names of the Directors of the said office, and of the registered officer.

This Memorial was recorded by order of Sir C. M. Jackson, then one of the Puisne Judges of the Supreme Court of Calcutta.

In the list of the shareholders contained in the paper referred to in the affidavit, is found the name of the Defendant, therein described as of Mauritius, for two shares.

On the 4th of August, 1855, on the petition of Mr. Ferguson, it was adjudged by the Supreme Court (which is the Court for relief of insolvent debtors) that the Company had committed an act of forfeiture pursuant to the provisions of the Act.

On the same 4th of August an order was made by Sir L. Peel, the Chief Justice of the Supreme Court, vesting all the property of the Company in the official assignee for the time being of the Court for the relief of insolvent debtors within the Presidency of Fort William, in Bengal, subject to the provisions of the Act of 1850 for the regulation of registered Companies.

On the 6th of October, 1855, on reading a petition of John Cochrane, Esq., described in the order as the official assignee and assignee of the estate and effects of the Asiatic Marine Insurance Office, an Order was made by the Supreme Court

that the sum of 150,000 rupees be raised by contribution of the shareholders of the said Asiatic Marine Insurance Office, for the satisfaction of the debts and other claims against the Company.

It appears that this sum was assessed by the official assignee on the several shareholders according to their shares, but that some of the shareholders failed to pay the sums so assessed, and on 5th January, 1856, an Order was made by the Supreme Court that the defaulting shareholders should pay the sums so assessed upon them, which are declared to be at the rate of 2,000 rupees per share at certain times specified in the Order, the time varying according to the residence of the shareholders: shareholders resident in Calcutta are to pay on or before the 1st March, 1856; shareholders in Hong Kong and Bombay, on or before the 3rd of May, 1856; shareholders resident in the Mauritius or Great Britain, and all other places not specified, on or before the 5th of July, 1856; and it was ordered that notice of the Order be published in the Calcutta papers once every month till the 5th July, and in the "London Gazette" and the principal papers of Hong Kong and the Mauritius. On referring to the list of shareholders on the 6th July, 1855, the only shareholder described as resident in Mauritius is the Appellant.

Several subsequent Orders were made by the Court, first confirming the assessment, and then ordering payment of further sums assessed on the shareholders to the same effect with those which we have already stated; the last Order for payment in question in this suit being made on the 5th December, 1857, and the time for payment in the Mauritius fixed for the 15th July, 1858.

All these proceedings appear to have taken place regularly and in conformity with the provisions of the Act, except that there is not evidence, as far as we can find, of the earlier Orders for payment having been advertised in the Mauritius, but there is evidence that two of such Orders were advertised.

The Defendant having refused to pay the several sums assessed upon him, an action was commenced against him by Mr. Cochrane, the official assignee, on the 28th August, 1860, to recover the sums which had then become due.

The summons and a copy of the declaration were

served on the Defendant personally, in the Island, on the same day.

On the 14th September, 1860, an Order was made by the Court, on the application of the Defendant, that the Plaintiff should give immediate copy of any deed, agreement, bill, or other written document, set out or referred to in his declaration.

On the 5th October, copies of all the orders of the Insolvent Court at Calcutta, as well as of the affidavits and other documents on which the action was grounded, were served on the Appellant's attorney.

On the 9th October, 1860, the Defendant put in the following defences :—

1. That the Plaintiff is without right, title, or capacity to sue Defendant in the present action.

2. That the Defendant never was indebted in manner and form as in the declaration alleged.

3. That the Defendant at the time of the alleged adjudication in the declaration mentioned, was not, nor is he, a shareholder in the said supposed Asiatic Marine Insurance Company.

On the 11th October, 1860, a general replication was filed by the Plaintiff, and on the same day notice of trial was given to the Defendant for the ensuing term.

The cause, therefore, was at this time at issue, and the Defendant had full notice of what it was necessary for him to prove at the trial; he was then in the island, and did not leave it for England till about the month of March or April 1861.

The trial of the cause seems to have been postponed by mutual consent of the parties till the 21st August, 1861, when it came on for trial before the First and Second Puisne Judges.

The Plaintiff, the present Respondent, put in evidence certificated copies of all the orders, and other proceedings in the Superior Court of Calcutta, to which we have referred.

He also put in a notarial certificate by a notary at Calcutta, verifying an extract from the Deed of Association, of the 1st June, 1852, of the Company in question (by which the Appellant appeared to have executed the deed by Mr. Ferguson, his attorney); a power of attorney executed by the Appellant at Calcutta on the 8th December, 1851, by which he appointed Ferguson his attorney for

certain purposes therein specified, and a solemn declaration made by Ferguson at Calcutta on the 20th April, 1860, that under the authority contained in the power of attorney annexed, and also under special verbal instructions from the Appellant he executed the copartnership deed of the 1st June, 1852, in the name, and as the act and deed of the Appellant, thereby making him a shareholder to the extent of two shares in the Company.

The Defendant at this time entered into no evidence whatever, but he objected to the admissibility of the evidence offered by the Plaintiff, and insisted that if admissible it was insufficient to prove the Plaintiff's case.

The objection seems to have rested mainly on the insufficiency of the certificated copies to prove the proceedings in the Supreme Court, and the insufficiency of the proceedings themselves, if proved, to establish the facts stated in them. No objection appears to have been made, or perhaps by the practice of the Court could have been made with success, to receiving the notarial copy of the extract from the partnership deed, or to admitting the declaration of Ferguson instead of his affidavit or examination *vivâ voce*.

The Court after argument took time to consider its Judgment, and on the 16th October overruled the Defendant's objections (which it terms preliminary objections), and ordered the case to be proceeded with on the merits on the first day when the same two Judges should be together on the Bench. Before, however, this time arrived, two applications were made by the Defendant to the Court for leave to enter into evidence, but these applications were refused by the Court by Orders dated the 18th December, 1861, and the 20th March, 1862; and ultimately, on the 27th March, 1862, the cause was finally disposed of on the merits, and there was Judgment for the Plaintiffs.

It is from this Judgment, and from the Orders of the 16th October and the 18th December, 1861, and the 20th March, 1862, that this Appeal is brought.

With respect to the Judgment of the 16th October, 1861, the main objection taken in the Court below to the admissibility of the evidence—that the proceedings which had taken place in the

Supreme Court of Calcutta could not be proved by certificated copies—has been very rightly abandoned at our Bar, and it is unnecessary, therefore, to say anything on that point; nor do we think it necessary to come to any decision as to the Orders of the 18th December, 1861, and the 20th March, 1862. We prefer to dispose of the case upon the merits, and upon the assumption that the evidence which the Defendant desired to introduce had been admitted. We have no doubt that there was abundant *primâ facie* evidence to justify the Court in holding that the several orders for payment by the shareholders of this Company to which we have adverted were made, and that the sums assessed upon and ordered to be paid by those shareholders were properly assessed and ordered to be paid by them as a class. But there was no order upon the Defendant, personally, as a shareholder to pay, and the question, and the only question, on the merits, is whether there was *primâ facie* evidence to show that he was a shareholder, and, if so, whether the evidence which he afterwards offered to rebut that case was sufficient to rebut it.

The evidence produced was, in their Lordships' opinion, sufficient to show that his name was on the last list of shareholders registered in the Supreme Court in July 1855. The doubt is whether there is proof from which the Court might reasonably infer that it had been placed there with his consent. Now the statement of Mr. Ferguson is that he executed the partnership deed in 1852, on behalf of the Defendant, and that he had special verbal instructions from the Defendant to do so. It is said that a power to execute a deed can only be validly given by deed, and that a parol authority is not sufficient for the purpose. But a partner may become liable in that character without having executed the partnership deed, and if the Court were satisfied by sufficient evidence that his name had been put upon the list of shareholders with his consent, so as to entitle him to participate in the profits of the concern, their Lordships would not think it necessary to inquire whether the parol authority could warrant the execution of the deed.

It appears to their Lordships that there was evidence from which this inference might fairly be drawn. In considering whether it ought to be

drawn or not, regard must be had to all the circumstances. There is the positive statement of Ferguson as to the instructions given to him, and their Lordships do not find that the Defendant ever offered to pledge his own oath to the statement that he was not a shareholder. Possibly the rules of the Court might not allow him to be examined as a witness on his own behalf; but their Lordships are at a loss to conceive why there was no affidavit on the part of the Defendant denying that he was a shareholder, if such was the fact, when the applications on his part were made to the Court for leave to go into evidence. Such an affidavit could not surely be inadmissible, and could not be otherwise than important. Again, the inference is materially strengthened by the course which the Defendant afterwards took. He did not propose, by cross-examining Ferguson, or by any other evidence, oral or documentary, to show that he had not given authority to any one to enter his name as a shareholder in this Company, or that he was not perfectly aware, from first to last, that his name was on the list, but he proposed to give evidence to show that before the new Company, which began on July 1, 1852, there was the old Company under the same title which expired on the 30th June, and which had carried on the same business, and that the power of attorney to Ferguson might relate and did relate to that Company. In support of that statement he tendered two letters addressed to him by Ferguson, one dated the 14th October, 1852, signed by Ferguson, as Secretary of the new Company, and addressed to the Defendant as agent in the Mauritius for such new Company, and the other dated the 7th April, 1853, signed by Ferguson, as "Secretary, Asiatic Marine Insurance Company, 1847-1852," and addressed to the Defendant as "Agent, Asiatic Insurance Company, 1847-1852, Port Louis, Mauritius."

Now the fact that the Defendant was a shareholder in the old Company, and Agent for that Company in the Mauritius, and that he continued Agent for the new Company, afforded no evidence whatever that he was not a shareholder in such new Company, but rather made it probable that he would be a shareholder.

Their Lordships are of opinion that the Defendant has throughout attempted to get rid of this



demand by mere technical objections, without offering any evidence tending to show that the sum demanded from him is not really due. And though they think that the proceedings have not been conducted in a very satisfactory manner on either side, and that the truth might have been more clearly established, they are convinced upon the whole that the decision below is consistent with the justice of the case, and that they ought not to expose the Respondent to the expense and delay which would attend a remit to the Court in Mauritius.

They have humbly advised Her Majesty to affirm the Judgment complained of, but as the case of the Plaintiff in the action has not been proved as distinctly as it might have been, they will not give any costs of the Appeal.

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