
(1947) 07 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Original Decree No. 28 of 1947

Rameswara Prosad Bajoria and others

APPELLANT

Vs

Satya Charan Law and others

RESPONDENT

Date of Decision : 30-07-1947

Acts Referred:

Citation : (1947) 07 CAL CK 0005

Final Decision : Allowed

Judgement

1. The Lothian Jute Mills Company Limited is a Joint Stock Company incorporated under the Indian Companies Act. Its share capital is Rs. 20 lacs divided into one thousand ordinary shares of Rs. 100 each, and one thousand preference shares of the like value. The ordinary share-holders only are entitled to vote at the meetings of the company. Messrs. Andrew Yule & Company are the Managing Agents since October, 1929. On the 23rd March 1944, the Articles of Association were amended at a Special Meeting of the share-holders. Article 109 provides that the number of directors shall not be less than three and not more than four in number. Of those one is to be appointed by the Managing Agents and the others to be elected by the share-holders at the Annual General Meeting. The director appointed by the Managing Agents is to be the Chairman of the Board of Directors. There is another Article, namely 126, which provides that the Company in General Meeting may from time to time increase or reduce the number of directors subject to the provisions of sec. 83A and 83B (2) of the Indian Companies Act, but this Article is not material in the appeal. As admitted by the parties we must in this appeal proceed on the basis that the number of directors can be four and not more. Articles 121 to 123 provide that one third of the Directors or the number nearest to one third for the time being, except the director appointed by the Managing Agents shall retire at the first ordinary meeting of the company of every year but the retiring director would be eligible for re-election. Article 116 (k) provides that the office of a director (other than ex officio Director) shall ipso facto be vacated if he is requested in writing by all his co-directors to resign and Article 128 provides that casual vacancies occurring

among directors may be filled up by the directors. In 1944, some persons called the Dalmia-Jain Group acquired more than half the number of ordinary shares. In that year the Board of Directors consisted of Cumberbatch, who was the nominee of the Managing Agents, Dr. Satya Charan Law, Sir David Ezra and Champalal Jatia. At the first ordinary meeting of the company of the year 1945 held on the 9th March, 1945, Sir David Ezra retired in accordance with the provisions of the Articles and offered himself for re-election. The Dalmia Jain Group of share-holders set up a rival candidate, Rameswara Prosad Bajoria and the latter was elected as a director in the place of Sir David Ezra. We do not think it necessary to state what other resolutions were passed at that meeting or the course of events that followed. They have a bearing on the merits of the suit but have no bearing on the questions which arise in this appeal.

2. Bajoria continued to act as director till December, 1945.

3. On the 22nd December, 1945, he got a notice to attend the meeting of the Board of Directors fixed for the 28th December, following. On the date, of the meeting he received a letter from the remaining three directors asking him to resign from his office. The said three directors thereafter appointed Sir David Ezra in his place. On the 14th January, 1946, the suit in which this appeal arises was filed. The Plaintiffs are--

(1) Rameswara Prosad Bajoria.

(2) Mriganka Kumar Boy.

(3) Vishnu Hari Dalmia, all the three on behalf of themselves and all the share-holders of the Lothian Jute Mills Company Limited, other than the Defendants, and

(4) The Lothian Jute Mills Company Ltd.

4. The Defendants are four in number. The first three are Dr. Satya Charan Law, Cumberbatch and Champalal Jatia who are admittedly the directors of the company and the fourth Defendant is Sir David Ezra, the legality of whose appointment as director is challenged in the suit. The substance of the plaint is that the three directors, Dr. Law, Cumberbatch and Champalal Jatia had acted wrongfully, illegally and mala fide in writing to the Plaintiff Rameswara Prosad Bajoria the said letter of the 28th December, 1945, asking him to resign, that they had exercised their power given under Article 116 (k) of the Articles of Association not in the interest of the company but for their own ends and for the interest of the Managing Agents, that their act was only a manoeuvre to fill up the vacancy that may be caused by one of their friends and nominees representing the minority of the share-holders and designed for excluding the majority of share-holders to have an effective control in the management of the company through their elected representative. In paragraph 20 it is alleged that the Defendants had acted wrongfully and mala fide and in the fraudulent exercise of their power, and that the impugned act on their part was and is not for the

benefit and interest of the company and the share-holders. Particulars of the statements made in paragraph 20 have been given in paragraph 20A--a paragraph which was introduced by an amendment of the plaint. We need not go into further details for the purpose of the appeal. The substance of the plaint is that the Defendants had acted wrongfully and in a mala fide way and that the rights of the company have been effected by their impugned act. Their case is that apart from the personal injury to Rameswara Prosad Bajoria the company is entitled to see that its affairs are controlled and managed by persons who have the right to do so and that the wrongful exclusion of a person from the Board who has the right to manage and control the affairs of the company and the inclusion of a person in the Board who has no legal title to be there are wrongs to the company. There is authority for the proposition that the wrongful removal of a director or the wrongful inclusion of a person in the Board of Directors is an injury to the company [La Campagne De Mayville v. Whitley [1896] 1 Ch. 788 at 806, Mozley v. Alston 1 Ph. 790 at 800: s.c. 41 E.R. 833 (1847) and Mac Dougall v. Gardiner 1 Ch.D. 13 : s.c. 46 L.J. Ch. 27 (1875).]

5. The material prayers in the plaint are :

- (1) for a declaration that the Plaintiff Rameswara Prosad Bajoria is still a director of the company;
- (2) for a declaration that the act of the Defendants Nos. 1 to 3 purporting to remove the said Plaintiff is void and inoperative;
- (3) for a declaration that the appointment of Defendant No. 4, Sir David Ezra as a director of the company is illegal, inoperative and void and for cancellation of the said appointment, if necessary; and
- (4) for consequential relief in the shape of injunctions.

6. On the 2nd February, 1946, the Defendants filed their written statement. Three days later they took out a summons for striking out the name of the company from the plaint. Our learned brother Edgley, J., framed a number of issues. Of those issues issue No. 1 is as follows :

Has the company been properly impleaded as a Plaintiff?

7. He tried this issue as a preliminary issue. By his judgment delivered on the 16th May, 1947, he answered this issue in favour of the Defendants, and directed the name of the company to be struck off from the plaint. It was admitted before him by the Defendants' counsel that the Plaintiffs Nos. 1 to 3 would have at a meeting of the company the majority of the share-holders on their side for continuing the suit as framed and in the name of the company as a Plaintiff, if such a meeting were to be held then on the direction of the Court. Our learned brother held that on the allegations made in the plaint the right course would be for the Plaintiffs Nos. 1 to 3 to sue on behalf of the share-holders other than the Defendants with the company as one of the Defendants. Against this judgment the Plaintiffs Nos. 1 to 3 and the company have filed this appeal.

8. Before we deal with the large number of decisions which were cited before our learned brother and also before us we think it necessary to state what in our opinion are fundamental principles. They are:--

1. If a wrongful act is done which affects the right or interest of a company it is the company which can and ought to sue for redress. This is based on the general principle that the person whose rights have been infringed can only sue. Only in exceptional circumstances share-holders would have the right to sue in their names, either individually or in a representative capacity, that is to say, on behalf of themselves and other share-holders, for the redress of such a wrong.

2. A wrong done to a company is in a sense a wrong done to each and every share-holder. But a share-holder or a body of share-holders cannot ordinarily be allowed to sue in their names for the redress of such a wrong, for if that right be admitted in every case it would follow that each and every share-holder would have the right to sue for a wrong done to the company but this cannot be allowed for three weighty reasons, namely:--

(a) for a multiplicity of suits in respect of the same matter would be the consequence, and

(b) because a company is itself a juristic personality and its legal entity is quite distinct from the personality of the share-holders.

(c) besides, there is the advantage in the general rule that for a wrong done to the company the company must sue, for in that case it would be in the power of the majority of the share-holders to put an end to the suit, if they be of opinion that the suit ought not to have been instituted at all.

3. To the general rule that to redress a wrong done to a company the company itself must sue, there are exceptions.

9. To get redress for such a wrong shareholders can sue in their own names only if a majority of shares are controlled by those against whom relief is sought, and the act complained of is either--

(a) ultra vires the company, or

(b) where the majority cannot, in law, bind the minority, or

(c) where the act complained of is a fraudulent one having the effect of depriving the company of property or affecting its financial resources.

10. This is a special right conferred on share-holders. In reality it is a special procedure sanctioned to afford the means to obtain redress for a wrong which would otherwise have remained unremedied, for if the ordinary rule that for a wrong done to the company the company itself must sue be not relaxed it would be in the power of the wrong-doers who have the control of majority of votes to prevent the institution of a suit in the name of the company, or if instituted to put an end to it by passing a resolution at a meeting of the company for the

discontinuance or withdrawal of the suit. These principles follow from what have been laid down in *Foss v. Harbottle* 2 Hare 461: s.c. 67 E.R. 189 (1813), *Mozley v. Alston* 1 Ph. 790 at 800: s.c. 41 E.R. 833 (1817), *Mac Dougall v. Gardiner* 1 Ch. D. 13: s.c. 45 I.J. Ch. 27 (1875), *Mason v. Harris* 11 Ch. D. 97 (1879), *Burland v. Earle* [1902] A.C. 83 at 93 and many other cases.

11. In *Imperial Hydropathic Hotel Co. v. Hampson* 23 Ch. D. 1. (1882) the question as to whether for redress of a wrong done to the company the suit must be brought in the name of the company did not arise. The observations made by Cotton, L.J., at page 9 of the report when dealing with costs are not, in our opinion, inconsistent with the observations made in *Foss v. Harbottle* 2 Hare 461: s.c. 67 E.R. 189 (1813) or of *Mozley v. Alston* 1 Ph. 790 at 800: s.c. 41 E.R. 833 (1817) on the authority of which we have formulated the first proposition.

12. As a corporation is an artificial person it must of necessity act through human agency. The physical act must be done by a human being or a body of human beings. A juristic act must have a will behind it. According to jurists a corporation has a will and that will finds expression through the majority of the corporators assembled in meeting. It would follow from this that ordinarily the majority of vocal share-holders, that is to say share-holders who have the right to vote and voting at a meeting of the company are the persons to perform an act on behalf of the company. Their act purporting to be on behalf of the company is the act of the company because through them the company expresses its will. So ordinarily they are the persons who are to file suits in the name of the company for redress of a wrong done to the company. This in our judgment is the fundamental principle (though not expressly stated therein) which lies behind the observations made in *Mozley v. Alston* 1 Ph. 790 at 800: s.c. 41 E.R. 833 (1817) that where the Majority of share-holders can put the company in motion the suit must be instituted with the company as the Plaintiff, where the injury complained of is an injury to the company. This is also the fundamental principle on which the observations made in *Mac Dougall v. Gardiner* 1 Ch. D. 13: s.c. 45 I.J. Ch. 27 (1875) relating to the power of the majority to put an end to a suit instituted by a shareholder in the name of the company can be rested. If therefore the majority of the share-holders at a meeting authorise a natural person, for instance, a shareholder, to institute a suit using the name of the company as Plaintiff for getting redress for an injury done to it ordinarily no objection can be taken to such a suit being brought in the name of the company both on principle and authority. If however, a suit is instituted by a share-holder in the name of the company for redressing a wrong done to the company without obtaining previously the authority of the majority of share-holders given at a meeting the suit is not to be struck out or the company's name removed from the category of Plaintiff. As the will of the company is expressed through the majority of vocal shareholders assembled at a meeting, the will of the company may be ascertained by the Court in which the suit is pending by directing a meeting of the vocal share-holders to be held, and if the majority of the share-holders at the said meeting be in favour of the suit, it would be allowed to continue. This is the

view expressed in *Mac Dougall v. Gardiner* 1 Ch. D. 13: s.c. 45 I.J. Ch. 27 (1875) by Sir George Jessel in *Pender v. Lushington* 6 Ch. D. 70 at 79 (1877) and in *Ducket v. Gover* 6 Ch. D. 82 (1877). No doubt the observations in *Pender*'s case 6 Ch. D. 70 at 79 (1877) were made in dealing with an application for interlocutory injunction : Sir George Jessel pointed out what mischief would result if a strict rule was laid down that a suit could be instituted by a shareholder in the name of the company only if the majority of share-holders had before the institution of the suit by a resolution passed at a meeting authorised him to do so. The natural person who sues in the name of the company armed with the previous authority of a resolution, passed by the majority of share-holders assembled at a meeting, is made an agent of the company by that resolution for the purpose of filing the suit in the name of the company, the resolution defining his authority, but if a person professing to be an agent does an act when he is in fact not an agent, or if an agent does it in excess of authority, the act is validated by ratification, so a resolution of the share-holders, in meeting subsequent to the filing of the suit by a share-holder in the name of the company, approving his action would be sufficient. The observations in the aforesaid two cases are based on these sound principles. We do not think that the observations made in *La Champagne De Mayville v. Whitley* [1896] 1 Ch. 788 at 806 bearing on the point we are discussing militates against our view. In that case seven persons had signed the memorandum but no shares had been allotted. Three directors had been appointed of which Seal was one. On the 14th February, 1896, without notice to Seal the remaining two directors met and elected the fourth director. Seal took out a summons on the 14th February, 1896, with the authority of five out of the seven subscribers written on a piece of paper which he had circulated to them individually and on which he got their signatures. That authority was not given to him by the persons in a meeting of the company. The letter of authority therefore expressed their individual wills--not the will of the company. Before this writ was served seal received on the 32nd February, the notice of a meeting of directors to be held on the 24th February, 1896, on the footing that there was then only three directors, the fourth man who had been irregularly elected on the 14th February, being ignored. At the meeting of the 24th two more directors were elected. At that meeting five hundred shares were allotted to each of the two old directors and certain other resolutions were passed. No other shares were allotted. A person was appointed solicitor of the company and by a resolution the said solicitor was instructed to take steps to have company's name as Plaintiff struck out from the writ which Seal had taken out.

13. It would be unnecessary to detail the learned discourses of jurists on the point as to whether a corporation has a will. But in arriving at their conclusions that a corporation has a will of its own and which is distinct from the wills of the individual corporators and is not the sum total of the wills of the majority of the individual corporators they lay great emphasis and importance on the assemblage of the corporators in meeting. Their discussions at a meeting of the

corporation has great effect upon their individual wills. Exchange of views on the particular topic under discussion at the meeting has, according to the jurists, the effect of modifying and subordinating the individual wills of the corporators directed towards the attainment of a common end and thereby emerging a will which is different from their individual wills and that will is to be attributed to the artificial person, namely the corporation and the majority of the corporators are considered to be the channel through which the corporation makes known, so to say, its will. Accordingly when Seal took out the summons on the 14th February, 1896, he had not been constituted by the company as its agent for the purpose of suing notwithstanding the fact that five of the subscribers who constituted the majority had signed the letter of authority on circulation, the letter which Seal produced. A meeting of the company was held on the 24th February, following. At that meeting the company expressed its will and that was that steps be taken through its solicitors to terminate the proceedings set in motion by Seal in the name of the company on the 14th February. The observations of Lindley. L.J., at page 803 of the report support the view of the case we are taking, and in our judgment implies what we have attempted to support from the principles of jurisprudence. His observations are :--

He has got the authority of five out of seven subscribers, it is true, got by him. I suppose, by sending round the letter of authority asking them for sanction. But that authority seems to me to be not worth the paper it is written upon. If authority is wanted to use the name of the company it must be authority got from the proper quarter--either from the directors or from the share-holders convened for the purpose.

14. The question whether a suit or proceeding commenced by a share-holder in the name of the company would be allowed to continue if later on the majority of share-holders in meeting had approved did not and could not have come up for consideration in that case as after the meeting of the 24th February, 1896, Seal could not have had any pretence to say that he had the majority of share-holders at his back. The two directors against whom he was complaining had between them all the 1000 shares that had been allotted up to the date when the objection to the use of the company's name by Seal was taken and heard. Kay, L.J., makes the position quite clear at p. 807 of the report, and A.L. Smith, L.J., at page 810 observed that the authorisation on which Seal was relying was not one obtained from share-holders. So there was no question of Seal having at any time the majority of share-holders at his back. This case has not the effect attributed to it by our brother Edgley, J., and does not militate against the general rules which we have formulated above. This is also the view which Palmer expresses (Palmer's on Company Precedents Part I, notes to Form No. 698 and 700 pages 1177 to 1181, 15th Edition).

15. We have already stated that a company must act through a human agency in filing a suit or initiating a proceeding in Court, as in other matters, and that generally the majority of share-holders, or one or more of them as representing

the majority of share-holders is that human agency for such purpose, for the will of the majority as expressed in meeting is the will of the company. The Articles of Association may, however, designate a particular natural person or a body of natural persons to be that human agency who is to act for the company. In the case before us Article 148 designates the Boards of Directors to be the body which is to act for the company. Article 148 runs as follows:--

The control of the company shall be vested in the directors and the business of the company shall be managed by the directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by Statute law expressly directed or required to be exercised or done by the company in general meeting, but subject nevertheless to the provisions of any Statute law and of these presents and to any regulations not being inconsistent with these presents from time to time made by the company in general meeting.

16. The relevant portion of Article 149 is as follows:--

Without prejudice to the general powers conferred by the last preceding Article and to any other powers or authorities conferred by these presents on the directors,--it is hereby expressly declared that the directors shall have the following powers, that is to say, the power--

(6) Subject to the provisions of sec. 86H (6) of the Act, to institute, conduct, defend, compound or abandon any legal proceedings by or against the company or its officers or otherwise concerning the affairs of the company and also to compound and allow time for payment or satisfaction of any debts due and of any claims or demands by or against the company.

17. The power to institute suits in the name of the company would have flowed from Article 148 and Article 149 is illustrative. For convenience, we would mention Article 149 (b) only in dealing with the question before us.

18. In our opinion Article 149 (b) designates the Board of Directors to be the persons who are to file suits in the name of the company for recovering debts due to the company, for enforcing claims of the company against others, as also for obtaining redress for an injury done to the company. As Articles of Association embody a contract between all the share-holders and the company and a contract between the share-holders inter se, they cannot be altered except with the consent of all, and that consent must be given by all the shareholders, both vocal and also those who are not entitled to vote, without a single exception. The only other way of altering any Article would be by following the machinery provided for in the Articles or in the Statute Law, that is to say, by the special resolution of the majority of shareholders (three-fourths majority) passed at an extra-ordinary meeting convened for the purpose of modifying the Articles. In view of the provisions of Article 149 (6) the Board of Directors would be the only persons to file suits for the company, and this would be the position as long

as that Article is not modified in the manner we have indicated above. The question, however, before us is whether the case which we have before us can be regarded as an exception to this rule, on the ground that it is the act of the directors themselves,--to be accurate, of the majority of them,--which is impugned in the suit as wrongful and illegal and to have caused injury to the company. As the issue we are trying is in the nature of a demurrer and was tried as a preliminary issue by our learned brother Edgley, J., we must proceed on the footing that the allegations made in the plaint are true, and that the act complained of, namely, the removal of Rameswara Prosad Bajoria from the Board of Directors was an illegal act on the part of the other three directors, Dr. Law, Cumberbatch and Champalal Jatia, that the appointment of Sir David Ezra as a director by the said three persons was an illegal act, and those illegal acts have caused injury to the company. In our opinion, in cases of this type no divergent views have been taken in England. Our brother Edgley, J., however, thought there is divergence and on that footing he preferred to follow what he thought to be the view expressed in the later cases. Assuming there is divergence we have to decide which view is more in consonance with fundamental principles. We would indicate later on what we consider to be these fundamental principles.

19. The principal cases which give support to the view that in such cases a shareholder who has the majority of the share-holders at his back can sue in the name of the company for an injury to the company are *Mac Douyall v. Gardiner* 1 Ch. D. 13 : s.c. 45 L.J. Ch. 27 1875) and *Marshall Valve Gear Company v. Manning Wardie & Company* [1909] 1 Ch. 267. The principal cases which according to our learned brother support the other view are *The Automatic Self Cleansing Filter. Co. v. Cunninghame* [1906] 2 Ch. 34, *Gramophone, and Typewriter Co. v. Stanley* [1908] 2 K.B. 89, *Salmon v. Quin and Axten, Limited* [1909] 1 Ch. 311 and *John Shaw (Selford), Limited v. Peter Shaw* [1935] 2 K.B. 113. We have already commented upon the case of *La Campagne de Mayville* [1896] 1 Ch. 788 at 806 on which our learned brother has relied in making his order.

20. The facts of *MacDougall's* case 1 Ch. D. 13 : s.c. 45 L.J. Ch. 27 1875) are better. They were as follows: The Plaintiff, *MacDougall* held 1750 shares in the *Emma Silver Mining Company, Limited*. Colonel *Gardiner* was a director of the company and was the Chairman of the Board of Directors. The Plaintiff and a large body of share-holders believed that the company had been cheated by certain fraudulent transactions in which the majority of directors including *Gardiner* were the participators along with the promoters and certain other persons. For that purpose they wanted the Plaintiff *MacDougall* to be elected as a director at the meeting of the company fixed for the 15th May, 1874, at which the election was to be held. To frustrate an investigation into the affairs of the company the Plaintiff alleged that the said directors, promoters and the other persons had set up a rival candidate, namely, *Hutton*. At the election at the meeting held on the 15th May, 1874, *Hutton* was declared elected. A suit was filed by the Plaintiff and other shareholders for a declaration that *Hutton* was not duly elected on certain grounds. The Plaintiffs in that suit applied for interim

injunction to restrain Hutton from acting as director but there was no chance of their application being heard before the long vacation of 1874. These are the introductory facts. The material facts are as follows: Seeing that no interlocutory injunction could be obtained before the long vacation MacDougall and other shareholders whose holdings were more than one-fifth of the share capital made a requisition on the 8th September, 1874, in accordance with the Article of Association for an extra-ordinary meeting for the purpose of removing Gardiner and for considering other matters. The meeting was held on the 14th October, 1874. Hutton took the chair. The partisans of Gardiner and Hutton and of the others who according to the Plaintiffs were participators in cheating the company moved a resolution for adjournment of the meeting. The resolution was opposed by the Plaintiff and his group. Hutton declared the motion for adjournment to be carried on a show of hands. The Plaintiff and other share-holders demanded a poll but Hutton ruled from the chair that poll could not be demanded on a motion for adjournment and left the chair with some of the share-holders. The share-holders who remained voted the Plaintiff to the chair, when the resolutions for which notice had been given were carried. MacDougall and other sharers filed the Bill making the directors and Hutton and the company as Defendants. The Plaintiffs had behind them the majority of shareholders. They did not admit Hutton to be a validly elected director. There were a number of prayers. One of them was for a declaration that the said refusal to grant a poll by Hutton was illegal and there were other prayers. In the plaint they charged the directors Defendants with collusion, fraud and characterised the act of Hutton as the result of collusion with the then directors and the promoters who were concerned in the fraud and designed to prevent ultimately an investigation into the affairs of the company. The Defendant Gardiner appeared and demurred to the Bill contending that the company ought to have been the Plaintiff. In the Law Journal report two Articles are set out. They with the other Articles were incorporated in the plaint. They are Articles 74 and 82. They are not set out in the authorised report. The material portion of Article 74 runs thus:

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 Companies Act, 1862 and 1867, or by these Articles required to be exercised by the company in general meeting subject nevertheless to any regulations of these Articles, to the provisions of the foregoing Acts and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.

21. Article 82 is as follows:--

The directors shall have power to carry on or discontinue or refer to arbitration any actions, suits, claims and demands for or against the company, whether by or against other persons or companies or its own members.

22. Mallins, V.C., overruled the demurrer [MacDougall v. Gardiner 1 Ch. D. 13 : s.c. 45 L.J. Ch. 27 1875)]. On appeal it was held that the company ought to have

been the Plaintiff. The further ground on which the demurrer was admitted, namely, that the Bill concerned the "internal management" of a company with which the Court would not interfere at the suit of a share-holder is not material having regard to the scope of the appeal before us. These two Articles are like the Articles we have before us and notwithstanding that, they had designated the directors to be the persons who are to file suits for the company and in its name the Court of Appeal held that the company should have brought the suit. The fact to be noted is that the Bill was against the directors themselves for alleged illegal or fraudulent acts done by them, that is to say, against these very persons who under the Articles were designated to be the only persons to represent the company in suits and actions.

23. In *Marshall Valve Gear Company v. Manning Wardle & Company* [1909] 1 Ch. 267 the directors of Marshall Valve Gear Company (hereafter called the Plaintiff company) had the entire management of that company vested in them by the Articles and so they only had the right to bring a suit for the company and in its name. Their powers were defined in exactly the same manner as in Article 74 in *MacDougall's case* 1 Ch. D. 13 : s.c. 45 L.J. Ch. 27 1875) and Article 148 which we have before us. The directors of the said company were Marshall, Charlesworth, Wardle and Frith. The share capital was ₹71,500 divided into 71,500 shares of ₹1 each; Marshall held 42,900 shares. The three other directors held 28,000 shares and the remaining 600 shares were held by others. The other three directors were interested in a rival patent which was being worked by Manning Wardle & Company, hereafter called the Defendant company. At a directors meeting of the Plaintiff company Marshall proposed a suit against the Defendant company for infringement of patent rights which was being worked by the Plaintiff company. The other directors overruled his proposition. He thereafter brought the suit against the Defendant company in the name of his company. Thereafter at a meeting of the Board of Directors of the Plaintiff company at which Marshall did not attend, a resolution was passed that as Marshall had instituted the suit in the name of the company without the sanction of the Board of Directors the solicitors of the company be instructed to apply to the Court to have the name of the company struck out. A notice of motion in the name of the company by those three dissenting directors were accordingly taken out. Neville, J., dismissed the motion holding that as Marshall commanded the majority of shares he, as share-holder, could bring that action in the name of the company. He noticed the decision in *Automatic Self Cleansing Filter Syndicate v. Cunningham* [1906] 2 Ch. 34 but distinguished it on the ground that the shareholders who had brought that action in the name of the company to restrain the sale of the undertaking by the directors, who had by the Articles the power to do so, had only a simple majority, whereas the Articles required a special resolution--a majority of three-fourths--to take away the said power given to the directors under the Articles. He refused to follow the other observations on the ground that they were obiter dicta and so not binding on him. The point to be noted in *Marshall Valve Gear Company's case* [1909] 1 Ch.

267 is that in the Board of Directors of the Plaintiff company the interest of the majority of directors clashed with the interest of that company respecting the subject-matter of the suit, for they had large interests in the rival company's patent against which in the plaint there was the charge of infringement of the patent held by the Plaintiff company. By reason of the conflict of their personal interest as persons interested in the patent which the Defendant company was working, with their duty as directors of the Plaintiff company of protecting the interest of that company, they were unwilling or had disabled themselves from instituting the suit in question.

24. In *Automatic Self Cleansing Filter Syndicate* [1906] 2 Ch. 34, the memorandum of association had empowered the company to sell its undertaking and by the Articles of Association the general management and control of the company as well as the power to sell the undertaking were vested in the directors by Article 96 of the Articles of Association of the company. That Article, however, provided that the powers of control and management and sale vested in the directors were subject to such regulations as might from time to time be made by special resolutions of the company. The directors were not desirous of selling the undertaking but at an ordinary meeting a simple majority of shareholders passed a resolution requiring the directors to sell the undertaking to a named person on certain terms. The directors refused to implement that resolution taking the view that the sale would not be to the interest of the company. A shareholder purporting to act for the company and on behalf of the majority of the share-holders applied to the Court for directing the directors to sell to that person on these terms. Warrington, J., held that the directors were justified in their refusal. On appeal the Plaintiffs contended that the directors were agents or servants of the company and so were bound to obey the mandate of the principal, and the mandate of the principal was the said resolution passed by the share-holders, and that notwithstanding, the Articles there is always the residuary power in the share-holders to give directions to the directors. Both those contentions were overruled. It was pointed out by Lindley, L.J., that for some purposes, the directors are like agents, but agents not of the share-holders but of the company, which in theory and in law is a distinct legal entity. If the company by its Articles had given a mandate or authority to the directors it is not fair to say that the majority of share-holders at a meeting is to be taken as the principal. The minority must also be taken into account, and the minority can be overborne only by the special machinery in the shape of special resolutions. In the matter of management of the affairs of the company *Cozens Hardy*, L.J., did not consider directors to be agents of the company. Their position according to him was like that of managing partners of a partnership business. He held that when the Articles themselves provide that the contract which confers the powers on the directors can be modified only by a special resolution, that contract cannot be modified in any other way. *Cozen Hardy*, L.J.'s decision was, therefore given not on the special wording of Article 96 but on the basis of another Article, an Article of the company which provided the machinery for the alteration of any

of the Articles of Association. In this view this case cannot be distinguished on the ground on which Neville, J., distinguished it in *Marshall Valve Gear's* case [1909] 1 Ch. 267, and the learned Counsel appearing before us for the Plaintiffs Appellants wishes to distinguish it on the self same grounds. There is in our opinion, no point of distinction in the fact that in *Marshall Valve Gear's* case [1909] 1 Ch. 267 and in the case before us the Articles had made the powers of the directors subject to regulations (not inconsistent with the provisions of the Company's Act and not inconsistent with the Articles themselves) passed in an ordinary meeting and that in *Automatic Self Cleansing Filter Syndicates'* case [1906] 2 Ch. 34 had made their powers subject to resolutions passed at an extraordinary meeting, (but at the same time subject to the same qualifications). The point, however, to note is that in the *Automatic Self Cleansing Filter Syndicate's* case [1906] 2 Ch. 34 the directors had acted within their powers, in a perfectly bona fide manner, keeping in view what they in their judgment considered to be in the interests of the company. There was nothing illegal, mala fide or fraudulent in their act in withholding their signature to the conveyance by which the sale of the company's undertaking was intended to be effected by the majority of the share-holders in meeting. This in our judgment is the distinguishing feature of that case.

25. The case of *Gramophone and Typewriter, Limited v. Stanley* [1908] 2 K.B. 89 was a case concerning income tax. An English company carrying on business in England owned all the share of a German Company, which did not carry on any business in England. The question was whether the English company could be taxed under Schedule D of the British Income Tax Act (16 & 17 Vict., O. 34) for the profits made by the German Company. It was held that the English company was liable to pay income tax on such part of the income of the German company which it had received in England overruling the contention of the Crown that the business of the German company was the business of the English company and so must be deemed to be carried on in England. In overruling the contention of the Crown, Buckley, L.J., referred to *Automatic Self Cleansing Filter Syndicate's* case [1906] 2 Ch. 34. We will quote the relevant passage from his judgment:--

Further it is urged that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This Court not long since in *Automatic Self Cleansing Filter Syndicate Co., Ltd. v. Cunninghame* [1906] 2 Ch. 34 that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not the servants to obey the directions given by the share-holders as individuals; they are not agents appointed by and bound to serve the share-holders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all

the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involved is a complete confusion of ideas.

26. These observations support the view we are taking of the ratio decidendi in Automatic Self Cleansing Filter Syndicate's case [1906] 2 Ch. 34 and lends strength to our view that that case cannot be distinguished on the ground on which it was distinguished by Neville, J., in Marshall Valve Gear's case [1909] 1 Ch. 267 and sought to be distinguished by the learned Advocate appearing for the Appellants. The special feature in Marshall Valve Gear's case [1909] 1 Ch. 267 which we have pointed out, and which was not present in Automatic Self Cleansing Syndicate's case [1906] 2 Ch. 34, was also absent in the case of Gramophone and Typewriter, Limited's case [1908] 2 K.B. 89.

27. In Salmon v. Quin and Axten, Limited [1909] 1 Ch. 311 the facts were as follows: Article 75 of the Articles of Association vested the management of the company in the Board of directors. The Board were to exercise all the powers of the company, subject nevertheless to the provisions of any Acts of Parliament or of the Articles and to such regulations (being not inconsistent with any of the articles) as may be prescribed by the company in general meeting, Article 76 gave power to the Board of directors to sell or let, exchange or otherwise dispose of the company's property or any part thereof. Article 80 provided that no resolution of the Board of directors having for its object the acquisition by purchase, etc., or sale, etc., by company shall not be valid or binding unless notice of the meeting in writing had been given to two share-holders, Salmon and Axten, twenty-four hours before the meeting specifying the business proposed to be transacted was held and neither of them had dissented therefrom in writing before or at the meeting. The directors proposed to sell some landed property and to acquire some others. On the receipt of the notice Salmon exercised his veto. Thereafter at a general meeting the share-holders by a simple majority (Axten who had a large number of shares voted with them) passed a resolution for the acquisition and sale of those properties. Salmon filed a Bill on his behalf and all other share-holders except the Defendants to restrain that resolution being given effect to and moved for an interlocutory injunction. The company was also made a Defendant. Warrington, J., refused the motion holding that Article 80 dealt with the resolutions of directors only and not of the company. The Court of appeal dissented from that view. Before the Court of appeal Salmon's counsel contended that the resolution of the company was inconsistent with Article 80 and so the resolution which had been covered by simple majority was ineffective and to have any effect it required such majority as would be necessary to alter the Articles of Association The cases of Automatic Self-Cleansing Filter Syndicate [1906] 2 Ch. 34 and Gramophone & Typewriter Ltd. [1908] 2 K.B. 89 were cited in support of his contention and Marshall Valve

Gear's case [1909] 1 Ch. 267 was sought to be distinguished by him on the ground that there the directors whose acts were challenged as illegal had acted for their own personal interest and in breach of the duty which they owed to the company. The correctness of the decision in *Marshall Valve Gear's case* [1909] 1 Ch. 267 on the facts on which it was given was not challenged by the Appellant's counsel. Exception was taken to the observations of Neville, J., where he doubted the soundness of some of the observations made in the *Automatic Self Cleansing Filter Syndicate's case* [1906] 2 Ch. 34 and *Gramophone & Typewriter Ltd's case* [1908] 2 K.B. 89. The Court of appeal did not express doubt on the actual decision in *Marshall Valve Gear's case* [1909] 1 Ch. 267. It left it unnoticed but by approving the other two cases it must be taken to have dissented from Neville, J.'s, criticism of those two cases. In our judgment those two line of cases to which we have referred can be reconciled by reason of the distinguishing feature we have noticed above.

28. In *John Shaw & Sons (Salford), Ltd. v. Peter and John Shaw* [1935] 2 K.B. 113 the "permanent" directors who under the articles had the power to bring that particular action for the company met and passed a resolution that the suit should be instituted. At that meeting the "ordinary" directors, namely, the Defendants were not summoned. In pursuance of that resolution they brought the suit in the name of the company. The majority of share-holders at an extraordinary general meeting of the company passed a resolution directing the Chairman of the Board of Directors to instruct the solicitors of the company to take steps to have the suit discontinued. A defence to the maintainability of the suit was accordingly taken at the trial on the strength of the resolution of the share-holders. On the merits all the three Lord Justices agreed in dismissing the suit. On the question whether the suit had been properly instituted in the name of the company, or if so instituted it is to be struck out by reason of the aforesaid resolution of the share-holders the three Judges differed. Greer, L.J., held that the resolution of the "permanent" directors which authorised the suit was a good resolution. It was not bad simply because no notice of that meeting had been given to the "ordinary" directors who under the articles had no right to vote at that meeting, Slessor, L.J., held that the omission to give them the notice vitiate] that resolution and therefore the suit had been instituted in the name of the company by the permanent directors without authority. He observed further that if the "permanent directors" had power under the articles to institute the suit he could not see how without altering the articles by a special resolution, the share-holders could interfere with that power and for that view relied upon *Salmon v. Quin & Axten Ltd.* [1909] 1 Ch. 311. He further observed that it was difficult to reconcile that case with the decision in *Marshall Valve Gear's case* [1909] 1 Ch. 267. Roche, L.J., refused to entertain the plea on the ground that it had been raised at a late stage of the suit and not by a notice of motion at the earliest opportunity. This was a case where the suit was instituted in the company's name by persons, who, under the articles had the authority to sue for the company. It was not a case where persons who had the authority under the

articles had refused to sue in the name of the company by reason of circumstances of the nature appearing in *Mac Dougalls case* 1 Ch. D. 13 : s.c. 45 L.J. Ch. 27 1875) and *Marshall Valve Gear's case* [1909] 1 Ch. 267 and were either unable or unwilling to put the Court in motion. We do not therefore think that the aforesaid observations made by Slesser, L.J., are correct.

29. In note No. 4 at page 420 of *Gore Browne on Joint Stock Companies* (40th Edition) the learned author remarks that "it seems difficult to reconcile *Pender v. Lushington* 6 Ch. D. 70 at 79 (1877), *Imperial Hydropathic Hotel Co. v. Hampson* 23 Ch. D. I. (1882) and *La Campagne De Mayville v. Whitley* [1896] 1 Ch. 788 at 806 with *Salmon v. Quin & Axten Ltd.* [1909] 1 Ch. 311 and *Automatic Self Cleansing Filter Syndicate v. Cunningham* [1906] 2 Ch. 34 and observes that none the less the former series of cases have been followed. We have already distinguished the last mentioned two cases and the cases of *Gramophone & Typewriter Ltd., v. Stanley* [1908] 2 K.B. 89 and *Shaw v. Shaw* [1935] 2 K.B. 113. Even if these last mentioned cases are taken to be in conflict with the cases of *Pender v. Lushington* 6 Ch. D. 70 at 79 (1877) and the other cases mentioned by *Gore Browne* in that note and with *Mac Dougall's case* 1 Ch. D. 13: s.c. 45 L.J. Ch. 27 (1875) and *Marshall Valve Gear's case* [1909] 1 Ch. 267 we prefer to follow this last mentioned series, as we think that they are based on sound principles. Directors of a company are trustees of the powers committed to them (*Buckley on Companies Act* page 728, 11th Edition). If for personal reasons they refuse or are unwilling or unable to do an act for the company or by reason of their own acts have disabled themselves from so acting the company can act through others who have an interest in the affairs of the company. This follows from what has been laid down in *Barron v. Potter* (1914) 1 Ch. 895 and it is on this solid foundation that the actual decision in *Marshall Valve Gear's case* [1909] 1 Ch. 267 can be rested.

30. We accordingly disagree with our learned brother Edgley, J., and hold that the company's name cannot Be removed from the category of Plaintiffs in as much as it has been admitted by the Defendants that if a meeting of shareholders be directed to be held *Rameswara Prasad Bajoria* who has used the name of the company as Plaintiff would have a majority of share-holders with him who would support the continuation of the suit in the name of the company. It is quite clear that the Defendant directors would not have filed this suit on behalf of the company (see also the statements in the affidavit of *Rameswara Prosad Bajoria* affirmed on the 15th January, 1946, which remain unchallenged.

31. We do not see any force in the objection raised by the Respondent's counsel on the basis of Or. 29 r. 1 of the Code of Civil Procedure. On the allegations made in the plaint *Rameswara Prosad Bajoria* claims to be still a director. Whether he is so or not is a point which has to be decided in the suit itself. In his aforesaid affidavit he states that he is able to depose to the facts of the case. So all the requirements of Or. 29 r. 1 has been complied with. The result is that this appeal is allowed and the order so far as it has directed the removal of the name of the

company from the category of Plaintiffs and the order for costs are set aside. The Appellants will have the costs of this appeal as also of the hearing of the preliminary issue from the Defendant Respondents. Certified for two counsel.