

lands purchased in the name of Vinayak in the year 1888. Mr. Patkar complains that the learned Judge was wrong in throwing the burden of proof upon his clients. And he quotes in support of his argument the decision in *Vinayak Narsinh v. Datto Govind*⁽¹⁾. That case, however, was decided on very different facts from those which are now before us. What we have here is that the learned Judge below having regard to all the evidence including the fact that there was a substantial nucleus of joint family property, found that this particular property had been purchased for the coparcenary. That, I think, is not a finding which can be successfully challenged now in second appeal.

No other point was taken, and for these reasons I dismiss the appeal with costs.

Appeal dismissed.

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(1) (1900) 25 Bom. 367.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

S. R. B. MOTILAL CHUNILAL (ORIGINAL OPPONENT), APPELLANT, *v.* THAKORLAL CHIMANLAL AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

1912.

March 28.

Indian Companies' Act (VI of 1882), sections 28, 45, 61—Indian Contract Act (IX of 1872), sections 2 (a), (b), 3, 10—Company—Shareholder—Inducement by the agent of the Company to take shares—Winding up—Recovery of calls on shares—Agreement that shares were not to be paid unless dividend was given—Agreement not registered—Payment of shares in cash—Condition precedent—Condition subsequent—"Bogus" shareholder.

The question as to whether a particular person became a member of a Company is a question of fact.

Where the Agent of a Company induces a person to sign an application for the shares of the Company and that person's name is accordingly entered in the register of members as a shareholder, there is a complete contract between that person and the Company's agent under sections 2 (a), (b), 3 and 10 of the Indian Contract Act (IX of 1872).

* First Appeal No. 104 of 1911.

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No contract by which shares are to be considered as duly paid when they are not in fact paid up is valid unless it is registered and when there is no such registered contract the shares are payable in cash.

Where in the event of a Company not making a profit the shares were not to be paid for at all, the shareholder was a "bogus" shareholder, and this is opposed to the whole object of the Companies' Acts in England and in India.

Calls made in the winding up being calls for something unpaid on the shares are not a debt due to the Company but are contributions due by a member under section 61 of the Indian Companies' Act (VI of 1882) and he is liable to pay them. The contribution under the section also applies to unpaid calls made before the winding up; because although that is a debt due to the Company it is not the less "an amount unpaid" on the shares with respect to which the member is liable.

When the Manager of a Company forwards to an applicant notice that he is entitled to shares in the Company accompanied by a form of application for shares and the applicant signs the form of application and returns it to the Manager, the applicant becomes liable as a shareholder, notice of allotment being immaterial.

FIRST appeal against the decision of M. B. Tyabji, District Judge of Broach, in application No. 1 of 1910, under the Indian Companies' Act (VI of 1882).

The Narmada Cotton Seed Crushing Company, Limited, being wound up, the Liquidators began to collect the money due on account of the calls of the shares of the Company, and they applied to the District Court of Broach for the recovery of calls on ten shares due by Sardar Rao Bahadur Motilal Chunilal, who denied liability alleging that he was induced to take the ten shares by one Girdharlal, the agent of the Company since deceased, by telling him that he was not to pay for the shares unless dividend was paid, and that he, accordingly applied for the shares but no notice of allotment was given to him.

The District Judge over-ruled Motilal's contention and directed him to pay the amount of the calls due by him on account of the shares for the following reasons:—

It is evident from Mr. Motilal's evidence that there was a private understanding between him and the agent that Mr. Motilal should be entered as a shareholder, that the circumstance that he was (only nominally as a matter of fact) a shareholder should be made use of to induce others to invest money in the Mill, while Mr. Motilal himself was not to pay what was due from him on the shares, unless and until the Mill became a profitable concern.

This agreement appears to me decidedly opposed to the public interests, and therefore of a kind which the Courts cannot countenance. On this ground I over-rule the objection.

Mr. Motilal took the shares subject to the conditions and terms embodied in the Memorandum of Association. Clause 144 of this is to this effect:—"On the trial or hearing of any action or suit to be brought by the Company, against any shareholder or his representatives, to recover any debt or money claimed to be due to the Company in respect of his shares, it shall be sufficient to prove that the name of the defendant is, or was, when the claim arose, on the register of the shareholders of the Company as a holder of the number of shares in respect of which such claim is made, and that the amount claimed is not entered as paid in the books of the Company."

These conditions are satisfied. The applicant never wrote to the agents cancelling the application for shares. The Liquidators' claim against him is therefore a good one and I direct the amount in question to be paid with costs.

Motilal Chunilal appealed.

Govindlal N. Thakore, for the appellant (opponent):—
Though we made an application for ten shares, we were induced to do so by the agent of the Company and no notice of the allotment of shares was given to us. The following elements must be present to saddle a man with liability as a shareholder:—

- (1) Application for shares,
- (2) Allotment of shares, and
- (3) Notice of allotment.

The contract for the shares was a conditional contract. There was condition precedent and unless that condition, namely, the payment of dividend, is satisfied we are not liable. If the condition was illegal the whole contract must fall through.

The following cases were cited during argument:—

Gunn's case⁽¹⁾, *Tothill's case*⁽²⁾, *Ward's case*⁽³⁾, *Reidpath's case*⁽⁴⁾, *Shackleford's case*⁽⁵⁾, *Ex parte Fletcher*⁽⁶⁾.

D. A. Khare, for the respondents (applicants):—As soon as the appellant applied for shares, the contract became complete

(1) (1867) L. R. 3 Ch. 40.

(2) (1865) L. R. 1 Ch. 85.

(3) (1870) L. R. 10 Eq. 659.

(4) (1870) L. R. 11 Eq. 86.

(5) (1866) L. R. 1 Ch. 567.

(6) (1867) 37 L. J. Ch. 49.

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and it was not necessary to give notice of allotment ; *Brown and Tucker's cases*⁽¹⁾.

The condition precedent relied on is opposed to law and cannot be enforced.

RUSSELL, J. :—This suit was brought by the Liquidator of the Narmada Cotton Seed Crushing Company, Limited, against the defendant Motilal Chunilal to recover calls upon ten shares in that Company of Rs. 100 each. The first question that arises is : Is the defendant a member of the Company ? By section 45 of the Indian Companies' Act members are (a) subscribers of the Memorandum of Association ; (b) every other person who has agreed with a Company under this Act to become a member of such Company, and whose name is entered on the register of members. The defendant's name was entered on the register of members, so this condition precedent has been complied with : see *Tufnell & Ponsonby's case*⁽²⁾. Did he agree to become a member ? That is a question of fact : Fry, J., in *Winstone's case*⁽³⁾. The evidence of the defendant is to this effect. He knew Girdharlal Pleader who was the agent of the Company and who asked defendant to take ten shares in it, and the defendant signed the application for them, (the application is an Exhibit herein). Defendant said he was doubtful whether the Company's business would be profitable. Girdharlal said he need not pay for the shares unless dividend was paid. Defendant was told that if he and others like him became shareholders the Company's shares would be taken up. Defendant would not have signed the application but for the condition. He never paid anything in respect of the shares, nor was any demand made upon him, nor was he informed that the ten shares had been allotted to him. In cross-examination he said he was President of the Agricultural and Industrial Association of Broach, and had been trying to manage industries in Broach. Girdharlal desired to increase the reputation of his Mill and to take

(1) (1871) 25 L. T. N. S. 654.

(2) (1885) 29 Ch. D. 421.

(3) (1879) 12 Ch. D. 239 at p. 246.

money from the defendant if there was profit. If he had received intimation of the allotment he would have filed it.

Girdharlal is dead, so the matter must be decided on this evidence.

Although a witness in the case *K. Narbheram* at page 11 says that there was an allotment of shares, the resolution for which was passed on 9th April 1908, and accordingly letters allotting shares were sent, still, we must adopt the finding of the Judge in the lower Court that the defendant received no notice that the shares had been allotted to him. The ordinary principles laid down in the Contract Act must apply to the case. And in our opinion when according to the defendant's statement "Girdharlal asked him to take ten shares in the Company and he signed the application for them" the proposal came from the Company's Agent and was accepted by the defendant. If this view is correct then there was a complete contract between the defendant and the Company's agent (see section 2 (a) and (b), Indian Contract Act, and sections 3 and 10). In *Nicol's case*⁽¹⁾ it was held that the agreement was not different from agreements in relation to other matters. No particular form is required: see *Ritso's case*⁽²⁾. And it may be expressed or implied and either written or oral: see *Bloxam's case*⁽³⁾.

It was suggested by Mr. Thakore in reply for the defendant that Girdharlal was not the Agent of the Company to make such a proposal. But the fact that the defendant was registered as a shareholder is evidence of ratification by the Company of Girdharlal's action in making the proposal to the defendant. And we have no doubt that in trying to get shareholders to subscribe he was acting within his authority as agent. Our view of the defendant's evidence is that he intended to become a member of the Company and knew that his name would be entered on the register and would be used as an inducement to other persons to become members but that he was not to be called upon to pay the money due in respect

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(1) (1885) 29 Ch. D. 421.

(2) (1877) 4 Ch. D. 774.

(3) (1864) 33 Beav. 529.

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of the ten shares unless and until the Mill made a profit. No doubt where an application for shares is subject to a condition precedent that condition must be performed to create a liability to take them. But where the application is subject to a condition subsequent the liability arises although the condition is never complied with : see Halsbury's Laws of England, Title "Companies", page 145, and the cases there cited.

Here we find there was a complete and binding agreement on the defendant's part to become a member although there may have been a condition subsequent as to the payment for the shares. Now it appears to us that such a condition subsequent is in direct violation of section 28 of the Indian Companies' Act which is as follows :—

"Every share in any Company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

In *Re British Farmers Pure Linseed Cake Company*⁽¹⁾, Jessel, M. R., held the meaning of the section to be that "you are prohibited from contracting that shares issued shall be paid for otherwise than in cash except by a registered contract." And Lord Blackburn in *Burkinshaw v. Nicolls*⁽²⁾ said that the 25th section of the English Act means no more than this: "that no contract by which shares shall be considered as duly paid up when they are not in fact paid up, shall be valid unless it be registered; and that when there is no such registered contract, the shares are to be payable in cash." In the present case in the event of the Company not making a profit the shares were not (according to the defendant's evidence) to be paid for at all. In other words in that event the defendant was to be a "bogus" shareholder. This, we do not hesitate to say, is opposed to the whole object of the Companies' Acts in England and in India.

Under these circumstances the defendant, under section 61 of the Indian Companies' Act, is liable for the amount claimed. For "calls made in the winding up, they being calls for some-

(1) (1878) 7 Ch. D. 533 at p. 535.

(2) (1878) 3 App. Cas. 1004 at p. 1025.

thing unpaid on the shares, that is a contribution due by the member under the Act, and is not a debt due to the Company. The contribution also under this section applies to the unpaid calls made before the winding up; because, though that is a debt due to the Company, it is not the less an amount unpaid (see clause (d) of the section) on the shares in respect of which he is liable": Jessel, M. R., *In re Whitehouse & Co.*⁽¹⁾

Mr. Thakore for the appellant relied on several cases. In *Gunn's case*⁽²⁾, Gunn applied for the shares and did not, as we have held defendant here did, accept them. And the same in *Tothill's case*⁽³⁾, where no allotment was made.

In *Ward's case*⁽⁴⁾ also it was an application by Ward for two hundred shares in respect of which no allotment was made. *Reidpath's case*⁽⁵⁾ does not touch the present one, because there it was held that mere posting of a letter of allotment is no communication to the applicant. In *Shackleford's case*⁽⁶⁾ the application was sent in by Shackleford in answer to which there was no allotment, held, there was no concluded contract by him to take the shares. So also *Ex parte Fletcher*⁽⁷⁾ does not apply. Looking at what we have said about the facts in this case, these cases, in our opinion, do not apply to the present.

On the other hand the present case, it appears to us, falls within *Brown and Tucker's cases*⁽⁸⁾, relied upon by Mr. D. A. Khare for the plaintiffs, where it was held that where the Manager of the Company forwarded to Thucker notice that he was entitled to shares in the Company accompanied by a form of application for shares, and Thucker signed the form of application and returned it to the Manager; that Thucker was liable as a shareholder, notice of allotment being immaterial.

Under these circumstances, the decision of the learned Judge in the Court below is correct and we dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1878) 9 Ch. D. 595 at p. 600.

(2) (1867) L. R. 3 Ch. 40.

(3) (1865) L. R. 1 Ch. 85.

(4) (1870) L. R. 10 Eq. 659.

(5) (1870) L. R. 11 Eq. 86.

(6) (1866) L. R. 1 Ch. 567.

(7) (1867) 37 L. J. Ch. 49.

(8) (1871) 25 L. T. N. S. 654.