never contemplated originally, and a variance would be created between the business practices in the two countries of India and England which has nothing to recommend it so far as I can see from the point of view of either fairness or common sense.

As regards the costs, there will, by arrangement between the parties, be no order as to costs.

Solicitors for plaintiff: Messrs. *Ardeshir Hormusji, Dinshaw & Co.*

Solicitors for defendants: Messrs. *Wadia, Gandhy and Co.*

Action dismissed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918.

January, 30.

THE HONOURABLE RAO BAHADUR RAMANBHAI M. NILKANTH AND MR. SANKALCHAND BECHARDAS, OFFICIAL LIQUIDATORS OF THE KATHIAWAD AND AHMEDABAD BANKING CORPORATION, LIMITED, (IN LIQUIDATION) (ORIGINAL OPPONENTS) APPELLANTS *v.* GHASHIRAM LADLIPRASAD, (ORIGINAL APPLICANT) RESPONDENT.*

Indian Companies Act (VI of 1882), sections 45 and 58—Rectification of register of shareholders—Winding up—Contributory—Application for shares—Condition attached—Applicant unable to fulfill the condition—Applicant's liability as a contributory—Intention to become a member in præsenti *or* in futuro.

A manager of a Banking Company represented to the petitioner that if the petitioner took 400 preference shares he would be appointed a cashier in a new branch of the company. In pursuance of this contract, the petitioner applied for 100 only of preference shares. He paid the deposit money and was entered on the register of shareholders. Subsequently he found himself unable to take up the remaining 300 shares, he was not appointed a cashier in the branch office and the contract was treated as cancelled by the Directors.

* First Appeal No. 108 of 1916.

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The petitioner having applied to have his name removed from the list of contributories in respect of preference shares.

Held, that the petitioner's application for 100 preference shares was conditional and that he had no intention to become a member of the company when he applied for the shares until he was appointed a cashier in the branch office. He was, therefore, entitled to be struck off the register of preference shareholders and could not be called upon as a contributory on that account.

Roger's case—*In re Universal Banking Company*(1), followed.

FIRST appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, in miscellaneous application No. 11 of 1914.

This was an application by the petitioner Ghashiram Ladliprasad to have his name removed from the list of contributories in respect of the preference and ordinary shares of the Kathiawad and Ahmedabad Banking Corporation, Ltd., (in liquidation) hereinafter called the Bank.

The facts out of which the application arose were as follows :—In 1910, the Bank wanted to have a branch opened at Dilkhusha in Lucknow and required the services of a cashier for the branch office. The representative of the Bank at Lucknow, one Telluram Puri, represented to the petitioner that if the petitioner would take up 400 preference shares at Rs. 100 each, he would be appointed a cashier of the branch at Dilkhusha. On this understanding with Telluram the petitioner applied for 100 preference shares and paid Rs. 5 per share. The shares were allotted to the petitioner on December 5, 1910.

On December 10, 1910, the Bank sent a letter to the petitioner in the following terms :—

"You will have received our letter of yesterday and will have filled up the application for three hundred shares. If you have not done so yet, you will do at your earliest convenience on the receipt hereof. You know it full well

(1) (1868) L. R. 3 Ch. 633.

that your appointment is made on your express undertaking to take up 400 preference shares.....".

The petitioner found, however, that he was not able to take up the remaining 300 shares and expressed his inability to the Bank. The Bank by its letter, dated December 15, 1910, wrote as follows :—

"We are sorry you find it difficult in consequence of altered condition to carry out your agreement to take up 400 preference shares We have written to your Manager to settle the matter with you in the best interest of both of yourself and the Bank. We trust a satisfactory arrangement will be arrived at."

Inspite of the above letter from the Bank, the petitioner received a letter from Telluram, dated April 29, 1911, as follows :—

"Allow me to mention that I sold the shares to you as to anybody (?) and acted as a commission agent of the Kathiawar and Ahmedabad Bank, Ltd., Ahmedabad. I have lately heard from our Head Office that the Directors have decided that all the shareholders may be requested to pay their dues before the 15th of May, after which date interest at the rate of 9 per cent. per annum will be charged on the balance due. I, therefore, beg to request you to please pay Rs. 4,500 before the said date in order to save the loss of interest."

To this the petitioner replied by his letter, dated May 3, 1911, as follows :—

"As you did not appoint us as a cashier, please refund our deposit. Your asking us to pay Rs. 4,500 is unnecessary as you have not fulfilled the condition made between you and us."

After further correspondence between the Bank and the petitioner, the Bank by its letter, dated July 8, 1911, informed the petitioner that,

"All the previous arrangements re : shares are taken as cancelled".

In the mean time another person was appointed cashier of the Bank.

Thereafter according to the petitioner, a fresh arrangement was agreed upon between the petitioner and the Bank that the petitioner should pay Rs. 500 more and apply for 100 ordinary (A) shares of Rs. 10 each fully paid up and that this fresh arrangement was formally

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intimated to the petitioner by a letter, dated July 8, 1911, from the Dilkhusha Branch.

From July 1911 to September 1913, the petitioner received no communication whatever from the Bank. In October 1913, the Official Liquidators of the Bank issued notice to the petitioner demanding Rs. 4,500 on account of 100 preference shares.

The petitioner, therefore, presented this application.

The District Judge was of opinion that, on the facts, the petitioner was entitled to have his name removed from the list of preference shareholders and as to ordinary shares he held that it was not shown that the petitioner ever applied to be made or was aware that he was made a shareholder in respect of these ordinary shares and was, therefore, entitled to have the register of ordinary shareholders corrected. According to the Judge the petitioner's position was that of an ordinary (A) shareholder to the extent of 100 fully paid shares.

The Bank appealed to the High Court.

G. N. Thakor, for the appellants :—As regards preference shares assuming that the alleged agreement is held proved, I submit that the company is still entitled to treat the respondent as a contributory.

The respondent's application for the shares and the company's allotment constitute a complete contract between the parties. The respondent's name was, besides, entered in the register of shareholders.

If the company has failed to appoint the respondent cashier and had committed a breach of the alleged condition, the respondent may have his remedy for such breach. Such a condition can be regarded as a condition subsequent only and not a condition precedent so as to affect the respondent's liability as a contributory.

I submit that when the respondent applied for and was allotted the shares he had an intention to become and did in fact become a member of the company *in præsenti*. I rely on *Fisher's* case—*In re Southport and West Lancashire Banking Company*[1]; and *Elkington's* case—*In re Richmond Hill Hotel Company*[2]. *Roger's* case—*In re Universal Banking Company*[3] was decided on its own facts and has to be read in the light of subsequent cases.

As to ordinary shares, the respondent is liable as a contributory on the facts of the case.

M. H. Vakil, for the respondent:—The preference shares were subscribed to conditionally. The company's letters, dated the 10th and 15th December 1910 show that the 100 preference shares were part of the 400 preference shares to be taken up on condition that the respondent was made a cashier in Lucknow Branch. It is clear from these two letters that the company's agent at Ahmedabad had knowledge of the conditional agreement. This condition of being made a cashier was a condition precedent to taking up the shares and as the respondent was never appointed a cashier the condition failed. In consequence of the failure of condition, the respondent could not be held liable as a contributory though his name might have been entered in the list of contributories: see *Roger's* case—*In re Universal Banking Company*[3]. He did not intend or agree to become a member of the company *in præsenti* as from the 5th December, 1910—the date on which he applied for the 100 preference shares. He continued to repudiate his liability for the shares and called for a return of the application money.

(1) (1885) 31 Ch. D. 120. (2) (1867) L. R. 2 Ch. 511

(3) (1868) L. R. 3 Ch. 633.

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The respondent is also entitled on the facts of the case to have his name removed from the list of ordinary shareholders.

C. A. V.

BEAMAN, J. :—I think that the applicant's case in respect of the 100 preference shares cannot be distinguished in any essential from *Roger's* case (*In re Universal Banking Company*)[1]. There Rogers desired to become the local agent of the company and was told by the company's agent that before being so appointed he must take up 100 shares. He accordingly applied for 100 shares, the agent at the same time writing to the Directors and stating the condition. Presently Rogers found that he was unable to pay the deposits and in consequence the Directors declined to appoint him local agent. Upon these facts it was held that there had been a conditional application, and if the allotment had likewise been conditional, the condition had not been fulfilled; and if it had been unconditional, then there was no agreement between the parties. Sir William Page Wood, L.J. said that to constitute a binding agreement of this kind there must be an application, an allotment and notice of allotment, and that where of course the application was conditional and known to be conditional at the time it reached the Directors, they were not at liberty to allot unconditionally so as to make a binding agreement by which the applicant became a member of the company. In this judgment of the Lordship I do not find the word "precedent" used as qualifying "condition"; and I very much doubt whether where the condition is regarded not from the point of time at which it is made (for there it must in every case of this kind be strictly a condition precedent) but from the time when its fulfilment is

[1] (1868) L. R. 3 Ch. 633.

expected, no very clear line of distinction can be drawn and maintained between a condition precedent and a condition subsequent. To take two cases at random, case already referred to and *Fisher's* case (*In re Southport and West Lancashire Banking Company*)[1], it will be found that in both the fulfilment of the condition appears to have been expected after the allotment was made. Yet in the first case it was held that Rogers had not agreed to become a member of the company because the condition was not fulfilled; while in the other case it was held that the condition upon which Fisher agreed to take the shares was a condition subsequent, and before the company was called on to fulfil it, it had gone into liquidation and became incapable of doing so. The Court there entertained no doubt but that Fisher had agreed to become a member of the company and that the non-fulfilment of the condition subsequent did not absolve him from being called upon as a contributory when the company went into liquidation. Probably the best criterion is that suggested, I think, by Lord Cairns in *Elkington's* case—*In re Richmond Hill Hotel Company*[2], that in all cases of this kind where a condition is in dispute the Court should look at the intention of the party applying for the shares and decide whether it was his intention to agree at the time he made the application to become a member of the company *in præsenti* or only *in futuro* after the condition had been fulfilled. Applying that test to the facts before us, I have no doubt that it was not the intention of the applicant here to become a member of the opponent company until he had been appointed their cashier in Lucknow. His case briefly is that he agreed with one Teluram, who was acting as agent for the company in Lucknow, to take up 100 preference shares on condition that the company would appoint

(1) (1885) 31 Ch. D. 120. (2) (1867) L R. 2 Ch. 511.

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him their cashier in the new branch they then contemplated opening in Lucknow. It is true that there is no evidence that that condition was communicated to the Directors of the company in Ahmedabad along with the applicant's application for 100 shares. These shares appear to have been duly allotted to him on the 5th of December 1910; and it is really a question of fact whether the Directors were aware, at the time of the allotment, of the condition annexed to the application. I think that their letters of the 10th and 15th of December show very clearly that they were. The full agreement was, as alleged by the applicant, that he was to take up 400 preference shares in all and upon doing so was to be appointed cashier in Lucknow. In fact he only applied for 100 shares and the letter of the 10th of December from the Directors shows that they were fully aware of the agreement entered into between the applicant and Teluram. For they there call upon him to take up the remaining 300 shares. Five days later it is clear that they had received some communication from him intimating that he was not in a position to take up this block. They thereupon wrote on the 15th of December in rather vague language thus:—"We have written to our Manager to settle the matter in the best interest both of yourself and the bank. We trust a satisfactory arrangement will be arrived at". The application for 100 shares had been accompanied by the Rs. 5 per share application deposit required by the Rules. There is no evidence to show that if 100 shares were actually allotted upon what terms they were allotted or whether the further Rs. 15 per share on allotment was demanded from the applicant. It is certain, however, that he never paid it.

Thus matters stood, and on the applicant's allegation he was entitled to assume that the proposed agreement had fallen through until April 1911 when Teluram

wrote to him, saying that he had sold him 100 shares in the ordinary course acting as the agent for the opponent Bank, just as he might have sold them to any other member of the public, and calling upon him to pay Rs. 4,500. Now, the terms upon which these preference shares were issued were: Rs. 5 on application, Rs. 15 on allotment and Rs. 10 a month for three months. It thus becomes apparent that the sum of Rs. 4,500 demanded by Teluram in April 1911 might have been due upon the 100 shares or might have represented the allotment payment on 400 shares. However that may be, on the 3rd of May, the applicant wrote repudiating all liability whatever for the 100 shares and demanding his application deposit back. Then, on the 8th of July 1911, the Directors of the Bank wrote to the applicant informing him that all these arrangements were now to be deemed cancelled.

Such are the facts before us relating to these 100 preference shares. Upon those facts I entertain no doubt but that the Directors of the Bank were well aware on the 5th of December 1910 that the application for the 100 preference shares was conditional in the manner now alleged by the applicant. I have felt some doubt and difficulty upon one point, and one point only, and that is whether this application for 100 shares can be separated from the agreement as a whole which was to take up 400 shares as the price of being appointed cashier of the Lucknow branch. It is arguable of course that it can, and that it must be treated as an entirely unconditioned application. I think, however, that the letters written by the opponent Bank on the 10th and 15th of December show clearly that this never was the understanding of the parties themselves. And in matters of this kind the chief object of the Court should be to get at the truth of the matter as to what was in the mind of the contracting parties and so do as far as

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possible justice between them under the law. I take it that this application for 100 shares out of 400 shares was merely in the nature of an instalment, or perhaps earnest money binding the contract which afterwards fell through. I think the whole course of subsequent dealings between the parties evidenced by the correspondence, to which I have referred, shows that this too was the understanding of the opponent Bank and that by July 1911 they had given up all idea of compelling the applicant to complete his agreement or hold him bound by the instalment application, as I call it, for 100 shares which had been received and the allotment apparently made by the 5th of December 1910. Thus, then, I should come to the same conclusion upon this part of the case as the Court in England came to in *Roger's case*[1], namely, that the applicant did not intend to agree to become a member of the company *in præsenti* as from the 5th of December 1910. He is, therefore, in my opinion, entitled to be struck off the register of preference shareholders and cannot be called upon as a contributory on that account.

The case is altogether different with regard to the 100 ordinary shares which from the meagre materials before us we must suppose to have been applied for and allotted on or about the 7th of July 1911. The applicant's case here is of a very curious character. He alleges that when the agreement for the purchase of 400 preference shares broke down a further agreement was made between himself and the company that the latter should retain the Rs. 500 application deposit accompanying his application for 100 preference shares of the 5th of December and should add to this Rs. 500 more evidenced by the entries of the 7th of July 1911 and with Rs. 1,000 thus in their hands should purchase

(1) (1868) L. R. 3 Ch. 633.

for him 100 fully paid up ordinary A shares. The facts are, however, that he appears to have been entered on the register as a holder of 100 ordinary shares, not 100 ordinary A shares. It is clear that he paid Rs. 500 on or about the 7th of July, and that is what he would have paid on an application and allotment for 100 ordinary shares. But what is decisive of the case he is now setting up is the fact not disputed that the ordinary A shares were not sanctioned or issued until the month of September 1911. I find it impossible, therefore, to believe that he could have applied for 100 such shares paying Rs. 5 per share on application as early as the 7th of July 1911. Now, the allotment of these shares was, as far as I can discover from these materials, made a month later, on the 7th of August. Up to that time he appears to have been credited with Rs. 300, which will be the amount required on allotment; and this sum was debited to him on the 7th of August 1911. Thus the Rs. 500 represented Rs. 2 per share on application and Rs. 3 per share on allotment, the whole transaction being complete and the allotment made by the 7th of August 1911. In respect of this no allegation whatever of any condition precedent or subsequent is made by the applicant. He merely meets the facts by the explanation I have already set forth and that explanation appears to me to be necessarily false. In these circumstances I see no reason to doubt that he rightly appears on the list of ordinary shareholders as a holder of 100 shares and is liable to be called upon as a contributory to that extent.

Thus, upon the first point I would agree with the conclusion reached by the learned trial Judge, while on the second point I differ from him and would amend his order and direct that the applicant be put upon the A list as a shareholder to the extent of 100 ordinary shares.

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In the facts of the case we think that each party should bear his own costs throughout.

Cross-objections dismissed with costs.

HEATON, J. :—We are dealing with this matter on the evidence which was accepted and recorded by the lower appellate Court. In respect of three items it has been contended that we ought not to receive the evidence. The first two items are letters purporting to come from the Bank dated the 10th and 15th of December 1910. It is said, they were received in evidence by the Judge at a period so late in the proceedings that he was not justified in then receiving them. It is also contended that these two letters are not proved to have been signed by the agents of the Bank. I think both objections fail. It is not shown that these documents were not put in at the first real hearing of the case by the Judge. All that the law requires is that they should be put in at the first hearing. Then they were put in as letters written on the letter-paper of the agents of the Bank and as bearing the signatures of those agents, and it was not objected at the time that they were not the letters of the agents. I think, therefore, that they were properly received without any further formal proof of the signatures. The third item is the letter of the 8th of July, which it is said contains a sentence, which was not in that letter originally but was interpolated afterwards for the purpose of making it bear a meaning which the original did not bear. We have considered all that can be said in favour of this objection and have come to the conclusion that the letter is a genuine letter.

There is also to my thinking no doubt that the petitioner's name did appear both on the register of preference shares and the register of ordinary shares as a holder of 100 shares in each case. The registers are not forthcoming. It is said, that they have been burnt.

But we know from what is called the summaries sent half-yearly to the Registrar of Companies that the name of the petitioner did appear in these registers.

For the rest, we have to deal with the case mainly on such correspondence as is forthcoming and it is not the whole correspondence. To take first the question as to whether the petitioner ought to be placed on the list of contributories as a holder of 100 preference shares; this question appears to me to be a question of fact, which we have to determine on the evidence. I gather from the numerous English cases, to which we have been referred, that a similar question has in England been dealt with as a question of fact to be determined on the evidence and circumstances of the case. Turning to the Companies' Act, the particular point which we have to determine is whether as stated in section 45 of the Act the petitioner had agreed with the company to become a member of the company. We know what the contract was between him and the company, for its terms, if not admitted, have been clearly brought out in the evidence and the discussion of the evidence. The contract was that if the petitioner took 400 preference shares he was to be appointed cashier of the Lucknow Branch of the Bank. In pursuance of this contract, the petitioner applied for 100 only of preference shares. He paid the deposit money and he was entered on the register. He found himself unable to take up the other 300 shares, he was not appointed cashier of the Branch Bank, and, as the correspondence shows, the contract went off. It remains, therefore, to determine whether in respect of the 100 shares the petitioner can be regarded as having agreed to become a member of the company. I have come to the conclusion, like my learned brother, that it cannot be so held. There never was any contract that the petitioner should take up 100 preference shares of the company.

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His doing so was in fact merely a step in pursuance of another and bigger contract. That contract fell through and not very long afterwards the petitioner repudiated his position as a shareholder for 100 shares. Those being the facts, I cannot hold that he did agree to become a shareholder for 100 shares. I was for some time hesitating, because it seemed to me that if the contentions were reversed, that if it was the company that was contending that he was not a shareholder and the petitioner who was contending that he was, the petitioner would have a very strong case, because his name was entered in the register and kept there. Though for a considerable time I was of opinion that this argument had much weight, I have now come to the conclusion that in reality it has no weight at all for this reason: if it was the company who was maintaining that the petitioner was not a shareholder and the petitioner who was maintaining that he was, the facts could not have been in any way similar to the facts we have in this case. I agree, therefore, that the petitioner should not be continued on the list of contributories in respect of 100 preference shares.

I agree with what my learned brother has said on the other part of the case, and that his name should be entered on the list of contributories in respect of 100 ordinary shares.

Order amended.

J. G. R.