

APPELLATE CIVIL.

Before Patterson J.

PABNA DHANABHĀNDĀR COMPANY, LTD.

v.

FAYZUDDIN MIYA.*

1932

Jan. 25, 26 ;
Feb. 2.

Company—Call of unpaid share capital—Service of notice on share-holders, if essential—Indian Companies Act (VII of 1913), ss. 21(2), 158, 159(2), 229—Code of Civil Procedure (Act V of 1908), s. 102.

A company incorporated under the Indian Companies Act has a right to call on its share-holders to pay up the balance of its share capital, that is, in technical language, to make a call ; the right to make a call is, however, hedged about with various restrictions as laid down in the articles of association.

A demand of the balance of unpaid share capital from a share-holder of a company by an auction-purchaser of its assets cannot take the place of notice of a formal call.

Under section 21(2) of the Indian Companies Act, the liability of any share-holder for the balance due on his shares is a debt due from him to the company from the time of his first taking up the shares ; but this liability is not enforceable against him without service upon him of valid notice in accordance with the articles of association and the provisions of the Act ; the mere passing of a resolution by the company to make a call is not a valid call without the service of notice.

A Second Appeal lies from a decision in a suit against any share-holder of a company for compelling his payment of the balance of unpaid share capital, even in the case of the claim in such suit being Rs. 500 or less, the said suit not being cognizable by any Court of Small Causes sitting outside the Presidency Towns, having regard to the provisions of sections 158 and 159 (2) of the Indian Companies Act.

SECOND APPEAL by the Pabna Dhanabhândâr Company, Limited.

The material facts will appear from the judgment.

Surajitchandra Lahiri for the respondent. The appeal is incompetent, the claim being below Rs. 500.

Krishnakamal Maitra, for the appellant, cited sections 158 and 159 (2) of the Indian Companies Act with reference to the preliminary objection, which was

*Appeals from Appellate Decrees, Nos. 1219 and 1220 of 1929, against the decrees of Nripendranath Guha, Second Subordinate Judge of Pabna, dated Nov. 30, 1928, affirming the decrees of Velayet Hossein, Second Munsif of Pabna, dated Feb. 25, 1928.

overruled. The defendant's liability existed apart from the call ever since they took up the shares. And the plaintiffs have, by their purchase, acquired the right to enforce the same.

Lahiri, for the respondents. Notice of call must be served on the defendants. In the absence of service of such notice, the suits are not maintainable.

Cur. adv. vult.

PATTERSON J. These appeals arise out of two suits brought by the Pabna Dhanabhândâr Company, Limited, against two persons who are alleged to have been share-holders in another trading company known as the City Bricks Company, Limited.

In December, 1920, the City Bricks Company mortgaged all its assets, including its uncalled capital, to the plaintiff company. In April, 1923, the plaintiff company sued the City Bricks Company on the mortgage, and in July of that year, while the mortgage suit was still pending, the City Bricks Company decided to go into voluntary liquidation. A liquidator was appointed in November, 1923 and was made a party to the mortgage suit in December, 1923. The mortgage suit was decreed in April, 1924, and, in August of that year, the entire mortgaged property, including the unpaid share capital, was purchased by the plaintiff company in execution of the mortgage decree. Meanwhile, on the 27th July, 1921 (that is to say, after the mortgage to the City Bricks Company, but before the institution of the mortgage suit), the directors of the City Bricks Company passed a resolution purporting to call up the unpaid share capital, the date fixed for payment being the 31st August, 1921.

The suits, out of which these appeals have arisen, are for the enforcement of the call against two of the share-holders of the defunct City Bricks Company, and were instituted on the 15th December, 1926, the plaintiff company having acquired the rights of the above City Bricks Company in respect of the shares in question by virtue of their auction purchase of

1932

Pabna
Dhanabhândâr
Company, Ltd.
v.
Fayzuddin Miya.

1932

Pabna
Dhanabhandār
Company, Ltd.
 v.
Fayzuddin Miya.
 ———
Patterson J.

August, 1924. The trial court dismissed both the suits on the ground that the plaintiff company had not succeeded in establishing that the defendants were share-holders of the City Bricks Company. On an appeal being taken by the plaintiff company to the district court, it was held by the lower appellate court that the defendants were share-holders of the City Bricks Company, but the appeal was nevertheless dismissed on grounds which appear at first sight to be inconsistent, one of the grounds being that the suits were barred by limitation under Article 112, Schedule I to the Indian Limitation Act, and the other being that there had been no valid call and that the plaintiff company had no cause of action.

The plaintiff company has now appealed to this Court, and the following points have amongst others been urged on its behalf.

As regards the cause of action, it is contended that the defendants' liability was not created by the call, but has been in existence ever since the defendants took up the shares in question, and that the plaintiff company have, by their auction-purchase, acquired the right to enforce this liability.

As regards limitation, it has been urged, on behalf of the plaintiff company, that it has not yet begun to run, or at most it has begun to run from the date of the plaintiff company's auction-purchase. It is further contended that the Article applicable is Article 120 and not Article 112, though it is really immaterial which Article is applicable, the suits having been instituted within three years of the plaintiff company's auction-purchase.

The appeals first came up for hearing before Mr. Justice Cuming, who sent the cases back to the lower appellate court for recording a clear and unmistakable finding as to whether any call had actually been made on the two defendants. The lower appellate court has, accordingly, after a further hearing, recorded a finding to the effect that, although the directors passed a resolution purporting to make

a call, no notice of call was ever served on the defendants. The lower appellate court was further of opinion that a mere resolution, without proof of service of notice, did not constitute a call, and, accordingly, held that no call had been made on the defendants in these suits. The further hearing of the appeals has, accordingly, proceeded on the footing that no notice of call was served on the defendants.

1932

Pabna
Dhanabhandār
Company, Ltd.
v.
Fayzuddin Miya.

Patterson J.

The plaintiff company having, by its auction-purchase, acquired the rights of the City Bricks Company in respect of the uncalled capital, it is necessary for the disposal of these appeals to consider what those rights were as against the defendants in these suits. The City Bricks Company undoubtedly had a right to call on the share-holders to pay up the balance of their share capital, that is, in technical language, to make a call. The right to make a call was, however, hedged about with various restrictions. What those restrictions were it is impossible to say, the articles of association not having been produced, but it is reasonable to suppose that the unpaid share capital could only be called up for certain purposes and in a certain manner, and, apart from any restrictions that may have been imposed by the articles of association, it would be contrary to all principles if a call could be enforced without due notice thereof being given to the share-holder concerned. On the company going into liquidation, the power to make calls would ordinarily vest either in the court or in the liquidator, but in the exercise of this power the court or the liquidator, as the case might be, would have to be guided by the articles of association, subject of course to the provisions contained in Part V of the Indian Companies Act. As far as I have been able to ascertain, the Act makes no provision for the exercise of the power to call up unpaid share capital otherwise than in accordance with the articles of association and the provisions contained in Part V. A mere demand by the plaintiff company after its auction-purchase cannot

1932

*Pabna
Dhanabándár
Company, Ltd.*
v.
Fayzuddin Miya.
Patterson J.

therefore take the place of a formal call. The shareholders are no doubt liable to be called upon to pay up the balance of the share capital, but their liability can only be enforced in the manner laid down in the articles of association and in the Act itself. Under section 21, clause (2) of the Act, the liability of shareholders in respect of the balance due on their shares was undoubtedly a debt due from them to the company, the debt due from them accruing at the time when their liability commenced, that is from the time when they first took up their shares. This liability was not, however, enforceable against the share-holders until a valid notice had been given to them in accordance with the articles of association and the provisions of the Act. The mere passing of a resolution cannot, in my opinion, be regarded as a valid call. Something more is required to constitute a valid call, namely, service of notice in pursuance of the resolution. No such notice having been served on the defendants in these suits, it must be held that their liability to pay the balance due on their shares cannot be enforced in the present proceedings:—the plaintiff company not having taken the appropriate steps for having notice of call served on the defendants, have no cause of action against them. In view of the provisions of section 229 of the Indian Companies Act and of the provisions of section 28, clause (6) and of section 47 of the Provincial Insolvency Act, the plaintiff company were quite within their rights in proceeding with the mortgage suit against the City Bricks Company even after the company went into liquidation, and in putting the mortgaged property to sale in execution of the decree obtained in that suit, but they have, in my opinion, misconceived their remedy and have failed to take the proper steps for the realization of their dues. I am not prepared to express any definite opinion as to what the appropriate steps would have been, but I see no reason why the plaintiff company, in their capacity as auction-purchasers of the unpaid share capital, should not have applied to the court either for authority to issue

notices of call in the name of the company on such of the share-holders as had not already received any notice, or for a direction on the liquidator to issue the necessary notices. In the alternative, the plaintiff company might have elected to follow one or the other of the courses open to it under section 47 of the Provincial Insolvency Act.

Be that as it may, it is in my opinion perfectly clear that no valid notice of call having been served on the defendants, the plaintiff company have no cause of action against them.

In this view of the matter, the question of limitation does not arise and it is not necessary to discuss it.

I find I have omitted to refer to the preliminary objection urged on behalf of the respondents on the ground that these appeals are incompetent, the amounts claimed being below Rs. 500 and the suits being, so it is said, of a nature cognizable by a Court of Small Causes. In view, however, of the provisions of section 159 (2) of the Indian Companies Act and of the definition of the term "contributory" in section 158 of that Act, I am of opinion that the preliminary objection is without any substance and I have accordingly considered and decided the appeals on the merits.

The appeals are dismissed with costs and the judgment and decrees of the lower appellate court are affirmed. Separate costs are awarded to the respondents in respect of each of the two hearings of the appeals in this Court, *viz.*, the former hearing before Mr. Justice Cuming and the present hearing.

Appeal dismissed.

A. K. D.

1932
 Pabna
 Dhanabhdndār
 Company, Ltd.
 v.
 Fayzuddin Miya.
 Patterson J.