ORIGINAL CIVIL.

Before Lort-Williams J.

In re: EAST BENGAL SUGAR MILLS, LTD. (*In Liquidation*).* 1940 *April* 22.

Company—*Winding-up—Company limited by shares—Unpaid calls barred by limitation—Liability of shareholder to contribute on winding-up—Indian Companies Act (VII of 1913), s. 156.*

Under s. 156 of the Indian Companies Act, 1913, the liability of a shareholder to contribute to the assets of a company limited by shares on its winding-up to the amount unpaid on his shares, is a new liability which arises notwithstanding that calls upon him have been made prior to the winding-up, are unpaid and have become barred by lapse of time.

In re *Whitehouse & Co.* (1) relied on.

Hansraj Gupta v. *Official Liquidators of Dehra Dun, etc., Company* (2) distinguished.

APPLICATION by shareholders objecting to their inclusion in the list of contributories.

Relevant facts and arguments of counsel are set out sufficiently in the judgment.

S. K. Basu for the applicants.

Moitra for the liquidator.

LORT WILLIAMS J. These are two applications on behalf of Kazi Abdul Rashid Khan Bahadur and Barada Kanta Ganguli Bahadur respectively who have been included in the list of contributories made by the Official Liquidator in the matter of the East Bengal Sugar Mills, Ltd. (*in liquidation*). They are numbered 27 and 28 in that list.

They object to their inclusion in the list on somewhat similar grounds, namely, that representations were made to them by Rama Nath Das, who was the

*Application in Original Suit, No. 36 of 1939.

(1) (1878) 9 Ch. D. 595. (2) (1932) I.L.R. 54 All. 1067; L.R. 60 I.A. 13.

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promoter of this company, and that they were induced by those representations to become shareholders, the allegation being that prior to the incorporation of the company Rama Nath Das showed each of them a draft memorandum and articles of association, with regard to which they made various suggestions for amendment. They consented to become shareholders on condition that these suggestions were included in the memorandum and articles of association, but subsequently found that the memorandum and articles of association eventually filed were different to the draft memorandum and articles of association which had been shown to them and did not embody their suggestions.

The answer to all this is that whatever happened was prior to the incorporation of the company. At the time of incorporation it was the duty of these two gentlemen to satisfy themselves that the memorandum and articles of association were in accordance with their views. Then was the time to object to become shareholders. Instead of that, both of them signed the usual application for shares which were allotted to them and both of them became shareholders of this company.

Kazi Abdul Rashid Khan Bahadur, in a letter written by his pleader on his behalf, dated July 16, 1935, set up entirely different objections to the demand then made upon him for payment of Rs. 1,841-14-11. In this he said that he had never agreed to purchase 200 shares in the company, that Rama Nath Das had asked him to be a signatory to the memorandum and articles of association, saying that a Mahomedan gentleman's name should be on it, that Rama Nath Das gave him a distinct assurance that he would not have to purchase any share or shares or pay any money out of his own pocket and on account of his importunities he signed the memorandum and articles telling Rama Nath that he would on no account purchase more than one share.

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These allegations have been answered by Rama Nath Das in two affidavits in which he gives a complete denial to each and all of the allegations made by Kazi Abdul Rashid (Khan Bahadur) and Rai Barada Kanta Ganguli Bahadur and I accept his version of what happened.

Learned counsel on behalf of these two shareholders, in addition to relying upon the facts stated in the affidavits, has raised a point of law, namely that a number of calls had been made from time to time by the company prior to the winding-up and had not been paid by either of these shareholders and had become barred by limitation. Therefore, he argued that it would not be proper to put their names upon the list of contributories because they were no longer liable to subscribe anything to the assets of the company in respect of calls or otherwise.

The answer to this is that s. 156 of the Indian Companies Act creates a new liability which provides that, in the event of a company being wound-up, every member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding-up, *etc.*, with the qualification, *inter alia*, that, in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount unpaid on his shares in respect of which he is liable as a member. This new liability arises for the first time upon the winding-up and is, in my opinion, unaffected by the fact that previous calls have been made by the company and have become barred by limitation. That this is the correct interpretation of the section is confirmed by the judgment of Jessel M. R. in *In re Whitehouse & Co.* (1):—

> First of all, it must be remembered that the 38th section of the Act, which directs what is to be paid in the case of a winding-up by the shareholders of of a limited company, creates new rights, and rights which did not exist

(1) (1878) 9 Ch. D. 595, 599.

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before the passing of the Companies Act, 1862, and rights which do not exist till there is a winding-up. That point was decided by the House of Lords in the case of *Webb* v. *Whiffin* (1), that it was in fact a new right, or rather a new liability as regards the shareholders; and that section alone, for this purpose, regulates their liability,

The section to which he referred is as follows:—

> In the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company,

the terms, for all practical purposes, being the same as in s. 156 of the Indian Companies Act.

The learned Master of the Rolls went on to say as follows:—

> That is a new liability; he is to contribute; it is a new contribution. It is a mistake to call that a debt due to the company. It is no such thing. It is not, as has been supposed, in any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company; and when we look further into the Act, it will be seen that it is a liability to contribution to be enforced by the liquidator. It is quite true that a call made before the winding-up* *is a debt due to the company, but that does not affect this new liability to contribution. But there are certain limits to the liability. This being a limited company, the only limit which it is necessary to refer to is that stated in the 4th sub-section of the 38th section; "In the case of a "company limited by shares, no contribution shall be required from any "member exceeding the amount, unpaid on the shares in respect of which he "is liable as a present or past member". Now, first of all, as regards the calls made in the winding-up, they being calls for something 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 on the shares in respect of which he is liable, and therefore he must be liable to contribute all that is unpaid on his shares. As I said before, it is as much unpaid if he had not paid the calls made before the winding-up, as it is in respect of the amount unpaid on the shares in respect of which no call has been made before the winding-up. It seems to me that the contributories' liability created by the 38th section being only limited to the amount unpaid, it is immaterial, for the purpose of this section, whether the call was made before or after the winding-up, provided the amount is unpaid.

The case of *Hansraj Gupta* v. *Official Liquidators of Dehra Dun, etc., Company* (2) is not in any way inconsistent with the judgment to which I have just referred. Their lordships of the Privy Council were therein dealing with a case under s. 186 of the Act,

(1) (1872) L. R. 5H. L. 711.
(2) (1932) I. L. R. 54 All. 1067 (1080); L. R. 60 I. A. 13 (23).

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and Lord Russel of Killowen specifically distinguished and excluded from his judgment questions arising out of the statutory liability created under s. 156.

The result is that these objections must be disallowed, and the names of these two shareholders must be included in the list of contributories.

The liquidator is entitled to costs against both the shareholders, the Taxing Officer will bear in mind that there has been only one hearing with regard to both the applications.

Application dismissed.

G. K. D.