APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Oldfield.

THE THODAPUZHA RUBBER COMPANY, LIMITED (PETITIONERS), APPELLANTS,

1917. July, 16.

v.

THE REGISTRAR AND ASSISTANT REGISTRAR OF JOINT STOCK COMPANIES, MADRAS (RESPONDENTS), RESPONDENTS.*

Indian Companies Act (*VII of* 1913), *sec.* 104, *cl.* (1) (b)—'*Share fully paid up otherwise than in cash,' meaning of—Exchange of debenture not matured for share, whether a payment in cash for share.*

Where in accordance with the terms of a debenture deed a company allots to a debenture-holder a fully paid-up share in exchange for the surrender of a debenture deed *not then mature*, the share as allotted is one 'fully paid up otherwise than in cash' within section 104 (1) (*b*) of the Indian Companies Act (VII of 1913).

Spargo's case (1873) L.R., 8 Ch. App., 407, distinguished.

APPEAL against the judgment of COUTTS TROTTER, J., in *In the matter of the claim of Thodapuzha Rubber Company, Limited, Messrs. Huson and Robinson, the Secretaries,* to file a return of allotment of shares under clause I (*a*) of section 104 of the Indian Companies Act (VII of 1913).

The facts appear from the third paragraph of the judgment of COUTTS TROTTER, J. (see next page).

The judgment of COUTTS TROTTER, J., was as follows :—

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COUTTS TROTTER, J.—This is a motion by the Thodapuzha Rubber Company, Limited, for an order, under section 45 of the Specific Relief Act, in the nature of a Mandamus to compel the Registrar of Joint Stock Companies to accept and file a return, under Form VI of the Indian Companies Rules, 1914, of the allotment of a number of shares. The Registrar refused to file the return on the

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* Original Side Appeal No. 10 of 1917.

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ground that the mere filling up of Form VI was not sufficient and that it was necessary to file further particulars under section 104 of the Act; and the real question is as to whether certain additional stamp duties are or are not payable by the company.

The short point that I have to determine is the true construction of section 104 of the Indian Companies Act, 1913. That is a Consolidation Act and is based in the main on the English Companies Consolidation Act of 1908. Section 104 specifies what the company is to do when it makes an allotment of shares. It must, by sub-section 1 (*a*), file with the Registrar the number and nominal amount of the shares, the names, etc., of the allottees and the amount paid or payable on each share. By sub-section 1 (*b*) in the case of shares allotted as fully or partly paid up otherwise than in cash, it must produce the contract in writing which constitutes the title of the allottee and various other particulars. By sub-section (2) where there is a contract upon which the title of the allottee depends but it is not in writing, particulars of its terms are to be reduced into writing and filed with the Registrar. It is unnecessary for me in this case to decide whether the contract evidencing the title of the allottee was or was not wholly in writing. The only question I am asked to decide is whether these shares were fully or partly paid up otherwise than in cash. The object of the section is to let those who have dealings with the company know when its shares have cash behind them and if they have not, to know the nature and value of the consideration or the alleged consideration. It is clear that the promoters of a company can put any value they like on such intangible assets as the good will of a business previously existing and made over to the company and can allot as many shares for it as they are minded to. What is essential is that they should let the public know that those shares so allotted as fully paid up do represent that intangible asset and not hard cash available in the coffers of the company as trading capital.

The facts giving rise to the present motion are very simple and are as follows: The proposed allottees were debenture-holders in the company and they held debentures of one hundred rupees each payable on the 1st of January, 1918. The only material clause in the conditions endorsed on the debenture is No. 11 which runs as follows: "The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company

part of or ranking *pari passu* with the ordinary shares of the original capital." The allottees in this case had exercised the option given them by the clause of giving notice to surrender their debentures and receive shares in exchange. The company has allotted them shares in accordance with the notice which rank as fully paid up shares: and the only question I have to determine is whether or no these shares are fully or partly paid up otherwise than in cash. The precise circumstances have not, so far as I can ascertain, been before a Court either in England or in this country. But there is a long line of decisions in the English Courts on various sections of the successive English Company Acts which have exhaustively considered and defined what is meant by a share paid up in cash. I think I ought not to do otherwise than follow those decisions, not only from respect to the very learned Judges who decided them but for the additional reason that the Indian Companies Act was framed on the lines of the English Act and must, I think, be supposed to have been intended to give effect to the settled law of the English Courts on the matters with which it deals. But for this, I should regard this as a plain case. It is, in no sense, within the mischief which the section is designed to obviate. These debentures were paid for in hard cash up to their full face value. When they were converted into shares, there remained behind the shares the one hundred rupees of hard cash in the coffers of the company which had been paid by the debenture-holders. If the public assumed from the register that the face value of these shares had passed to the company in money available to it as trading capital, the public was right. I go further and think that a lay member of the public would be far more likely to be misled if the particulars of the arrangement were placed upon the register as demanded. A lawyer would, no doubt, understand the true nature of the arrangement, I think it quite possible that a layman might misapprehend it and go away with a confused notion that these shares were represented in some way by a paper consideration. I am sorry to say I feel unable, in the face of the decisions, to take this broad view.

Prima facie, 'share fully paid up in cash' would seem to import a handing over of money, including, of course, negotiable instruments, in return for the shares. But it was early seen that the matter was not quite so simple as that. In *Spargo's case*(1), the facts were as follows: Spargo had agreed to take up 51 shares in a

(1) (1873) L.R., 8 Ch. App., 407.

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company for the price of £ 2,550. He had also agreed to sell a certain mining lease for the sum of £2,176. In the books of the company, he was debited with the price of the shares and credited with the purchase price of the mining lease and paid the balance in cash. It was held that this was a purchase of the shares for cash on the ground that, as there were debts presently due on either side, it was unnecessary to go through the form of handing over cash on one transaction and returning it immediately on the other. Lord Justice MELLISH laid down a test which he had formerly elaborated in *Fothergill's Case*(1) that the shares must be treated as paid for in cash if what had been done would give rise to a good plea of payment, as distinct from a plea of accord and satisfaction. That sounds like a technical rule of English pleading, but it is a very convenient test and is one which, if applied, harmonises all the decisions with the possible exception of some observations of FRY, L.J., in *In re Johannesburg Hotel Company*(2). In *Kent's case*(3), Kent was a holder of shares in a Company which were not fully paid up but in respect of which there were no arrears of past calls or any present calls due. He took an assignment from a creditor of the company of the debt owed by the company to the assignor, but which, by an agreement between the assignor and the company was made repayable in future instalments, none of which was at the moment due or in arrears. Kent and the company came to an arrangement by which the payment of the future calls on Kent's shares was to be satisfied by crediting towards them the instalments as they fell due from the company under its debt to Kent's assignor. It was held by the Court of Appeal that Kent's shares could not be treated as paid for in cash. The Court took notice of the fact that no entries were made in the company's books carrying out the transaction, but the real ground of the decision was that the debt purchased by Kent and the unpaid calls were neither of them debts payable *in præsenti*.

In *In re Jones Lloyd and Co., Limited*(4), the company owed a shareholder a present liability in cash which it was agreed should be set off against calls on shares to become due *in future*. Mr. Chamier urges that the real ground of that decision is that the matter is to be looked at broadly to see whether the company has had the enjoyment of cash in return for the shares. If that were so, and I were to follow that case on that supposition that would be enough for

(1) (1873) L.R. 8 Ch. App., 270.
(2) (1891) 1 Ch., 119.
(3) (1888) L.R. 39 Ch.D., 259.
(4) (1889) L.R., 41 Ch. D., 159.

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Mr. Chamier's contention. But I think the decision is perfectly consistent with the narrower test adopted in the earlier cases. If the Company in that case had brought an action on one of the calls, the share-holder, in my opinion, could have pleaded payment, not the less so because the payment had been made before it was legally due. In *In re Johannesburg Hotel Company*(1), the promoters of the Company agreed to have their promotion expenses discharged by the Company in fully paid shares. The Court held that these shares could not be treated as having been paid for in cash. The decision was arrived at by drawing a distinction between discharging a debt by the allotment of fully paid up shares and the setting off of a debt against the money due on shares which were not fully paid up until the transaction set off had been completed. The distinction is a very fine one and Lord HALSBURY who formed one of the Court took no pains to conceal his view that *Spargo's case*(2) was wrongly decided; and Lord Justice FRY said of *Spargo's case*(2) that it, in effect, struck the words 'in cash' out of the statute. *Spargo's case*(2) has since been re-habilitated by a very strong Committee of the Privy Council in *Larocque* v. *Beauchemin*(3). In *North Sidney Investment and Tramway Company* v. *Higgins*(4), *In re Johannesburg Hotel Company*(1) was supported on the narrower ground that as the agreement in that case for promotion expenses was made before the Company came into existence, it could not be said to create a present debt from the Company at all. I am, therefore, of opinion that there is nothing to prevent my applying the principle of *Spargo's case*(2) if the present facts can be brought within it. I need, I think, only refer to one other case and that is *Barrow's case*(5). With the actual decision, I am not concerned; but Sir GEORGE JESSEL, M.R., with the concurrence of JAMES and BAGGALLAY, LL. JJ., made some observations which appear to me exactly opposite to the present case. In that case, the Company had agreed to buy a colliery and to pay for it at their option either in cash or fully-paid-up shares; and at the material period they had exercised their option and elected to pay in shares. Sir GEORGE JESSEL, M.R., says this: 'The appellant must show that there was money due from the Company which could be set off. There never was any due as regards these shares because, before the time for conveying the property had arrived, that is, before any money was receivable from the Company, the Company had exercised the option to pay in shares;

(1) (1891) 1 Ch., 119. (2) (1873) L.R., 8 Ch. App., 407.
(3) (1897) A.C., 358. (4) (1899) A.C., 263.
(5) (1880) L.R., 14 Ch.D., 432.

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so that there never was a moment of time when there was any money due from the Company to the appellant which was capable of being set off.' (I insert the word 'because' into the sentence which is omitted in the report by an obvious typographical error.) I see nothing in this inconsistent with the decision in *Spargo's case*(1) and I think it is a direct authority for the proposition that where the taking of shares is the original consideration and not due to a subsequent adjustment by way of set-off there is not a payment of cash within the meaning of the authorities. If I treat that pronouncement of JESSEL, M.R., as forming part of the decision in *Barrow's case*(2) and follow it, it is necessarily fatal to Mr. Chamier's contention. But even if I do not and apply the test of *Spargo's case*(1) directly, I think the same result follows. These debentures were not repayable until the 1st of January, 1918. By an arrangement the terms of which are contained in the 11th clause of the debenture and the notice given by the debenture-holder in accordance with it, the debenture-holder agreed to surrender his debenture before it was repayable and to accept shares in return. It was not within the contemplation of the parties at any time that cash should pass or be considered as due on either transaction. If the debenture-holder had sought before its maturity to surrender his debenture in return for cash, the Company would have been entitled to refuse him. I think it really comes to this: was there a single transaction or was there a conflation of two transactions? An illustration was put in the course of the argument which, at first sight, looked very cogent. Supposing I go into a shop, buy a table and pay for it and subsequently, by arrangement with the shopkeeper, return the table and take a side-board instead, the shopkeeper throughout retaining my money, could any one say that the side-board had not been paid for in cash. Possibly not, though I think it is arguable that the legal effect of the transaction was that I gave up my table in exchange for the shopkeeper's side-board. But the real question is: Could it be said that the true effect of the transaction was that the shop-keeper cancelled the debt which I owed him for the side-board in return for my foregoing the price of the table due from him to me? No one, I think, would so describe the transaction for the simple reason that it was never in the contemplation of the parties that the shop-keeper should pay me a sum of money in any contingency. Applying the direct test of *Spargo's case*(1) to the present facts I am clearly of opinion that, if the Company had sued the allottees of

(1) (1873) 8 Ch. App., 407. (2) (1880) L.R., 14 Ch.D., 432.

these shares for their value, they could not have pleaded payment but would be compelled to set out the special arrangement and allege it as accord and satisfaction only.

I come to this conclusion with much regret because, as I have said, the transaction is, in my opinion, not within the mischief which the statute meant to guard against and I cannot think that the legislature could have intended, if such cases as the present had been in its contemplation, to inflict so heavy a penalty upon the parties. If an Appellate Court can see its way to cut the knot and declare this broadly to be a payment in cash because the end of the transaction is that the Company is left with the debenture-holder's cash, and the debenture-holder with the Company's shares to the same value, I should welcome the decision. I do not feel myself, as a judge of first instance, free to take that view in the face of the decided cases; and I fear the hardship can only be put right by the legislature. My decision, therefore, must be in favour of the respondent and I dismiss the motion accordingly.

With regard to costs, Mr. Chamier has invited me, should I be against him to deprive the respondent of costs on the ground that the Assistant Registrar of Joint Stock Companies had filed a disingenuous affidavit in response to the notice of motion. At the time I was inclined to agree with his criticism of the affidavit, but on reflection I do not think it can be charged with anything worse than unfortunate wording. Certainly, if the affidavit did hint at a plea evasive of the real merits of the question, the learned Advocate-General has, as one would expect, discarded it and confined his arguments to the substance of what I have to decide. In any case, the correspondence shows, beyond question, that the argument which has prevailed to-day was put before the petitioners and that the Registrar was quite ready to assist them, so far as lay in his power, to mitigate the severity of the result by treating the case as falling under sub-section (2) rather than under sub-section (1) (*b*). Whether that can be done or not is an extremely difficult question on which I cannot assist the parties, but must leave them to settle with the Revenue authorities. I see no ground for departing from the ordinary course and dismiss the motion with taxed costs."

The petitioners preferred this appeal.

D. Chamier for the appellants relied on his arguments as appearing in the judgment of COUTTS TROTTER, J.

Hon. Mr. *S. Srinivasa Ayyangar*, the Advocate-General for the respondent, in addition to his arguments which appear in

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the judgment of COUTTS TROTTER, J., cited Palmer's Company Precedents, Part III, Form 44, page 297 (Eleventh Edition), Palmer on Company, Volume I, page 69, Buckley on Companies (Ninth Edition), page 203, to show that unless cash was actually due by the Company there can be no set-off.

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from a decision of Mr. Justice COUTTS TROTTER that an allotment by the appellant company of a fully-paid-up share to a debenture-holder in exchange for his debenture pursuant to a condition in the debenture is an allotment of a share 'as fully paid up otherwise than in cash' within the meaning of section 104 (1) (*b*) of the Indian Companies Act, 1913. The debenture deed provides:

"The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully-paid ordinary share of Rs. 100 of the Company part of or ranking *pari passu* with the ordinary shares of the original capital. Upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half-year in which the registration is made."

I agree entirely with the learned Judge in holding that the share allotted in these circumstances was allotted as fully paid up otherwise than in cash and therefore came within the provisions of section 104 (1) (*b*) of the Act.

It has been argued before us that because the debenture-holder originally paid Rs. 100 in cash for his debenture the share in the company which was allotted to him some years afterwards should be regarded as paid up in cash. What the debenture-holder got for his Rs. 100 was a debenture and all the rights which a debenture-holder has, and he enjoyed those rights for a number of years and afterwards parted with those rights pursuant to the provision in the debenture deed and acquired a share in consideration of his surrender of the debenture deed, so that he acquired the share, as stated in the clause itself, in exchange for the debenture. Speaking for myself I fail altogether to see how that can be said to be a case in which the share was allotted to him as fully paid up in cash. It seems to me that it was allotted to him as expressly stated not for cash but in consideration of the surrender of his debenture and

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the rights which he held under it. There is admittedly no case in the books upon section 25 of the English Companies Act, 1867, or the more recent sections, which precisely covers this point. But I am glad to see that the same view is taken by Sir Francis Palmer with regard to a clause in the debenture which is practically in the same terms, in Part III of the eleventh edition of his Company Precedents, Form 44 at page 297. I do not think it necessary to go through the cases which have been cited before us; many of which are dealt with by the learned Judge in his judgment. The present case is clearly distinguishable from *Spargo's case*(1) where money was actually due by the company to the person (the vendor to the company) to whom the share was allotted. Here the debenture has not yet become payable to the allottee and therefore there is nothing which can be made the subject of a set-off. It is, I think, clear upon the authorities that in a case like this there must be a debt actually due and owing by the company to make the doctrine of *Spargo's case*(1) applicable. It is also unnecessary to consider whether there must also be a debt immediately due and payable by the company to the allottee. In *Ferrao's case*(2) it was held that this is not necessary. It does, however, appear abundantly clear that to apply that doctrine there must be a debt immediately due and payable by the company to the allottee. For these reasons, I think the appeal fails and must be dismissed with costs.

OLDFIELD, J.

OLDFIELD, J.—I agree.

N.R.

(1) (1873) L.R., 8 Ch. App., 407. (2) (1874) L.R., 9 Ch. App., 355.