

*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.*

MAHENDRA GOPAL MUKERJI (APPLICANT) v. LACHMAN PRASAD AND ANOTHER (OPPOSITE PARTIES).\*

*Company—Winding up—Shares applied for subject to a condition, and partly paid for—Condition not fulfilled—Resolution of company to refund part payment—Position of applicant as regards winding up proceedings.*

A company started in Meerut in 1904, with objects of a very general nature, proposed in 1906 to erect a mill at Fyzabad, and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one M. applied for shares, but added to his application a condition to the following effect :—“These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad.” The company, however, found that they could not raise the necessary funds to start a mill at Fyzabad, and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the company went into liquidation.

*Held* that M. was in the circumstances not a member of the company, but a creditor and entitled to get back what he had already paid.

THE facts of this case were as follows :—

A company was started in Meerut in 1904, which was called the Ganga General Mills Company, Limited. Its object apparently was to carry on business of any and every description. Apparently in 1906 this company considered the advisability of starting a branch mill at Fyzabad or its suburbs. It accordingly issued a prospectus and invited the public to subscribe the necessary capital. The present applicant put in an application in the ordinary form in which the following condition was entered :—“These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad.” The application was entertained by the Directors and shares were allotted, but no mill was started at Fyzabad. Subsequently, on the 27th of September, 1909, a resolution was passed by the company that “as there was no prospect of starting a branch factory at Fyzabad, the conditional share-holders may be paid.” After this the company failed and went into liquidation. The present appellant's name was on the register of members, and he was called upon to pay the balance due on the shares. The court of first instance held that he was a member of the company and therefore must pay the balance due from him. The applicant thereupon appealed to the High Court.

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\* First Appeal No. 17 of 1918, from an order of L. Johnston, District Judge of Meerut, dated the 11th of October, 1914.

Dr. *Surendra Nath Sen*, for the appellant.

Mr. *Nihal Chand* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

TUDBALL, and MUHAMMAD RAFIQ, JJ. :—These four appeals are all connected and are governed by this judgement. The facts are very briefly as follows :—A company was started in Meerut in 1904, which was called the Ganga General Mills Company, Limited. Its object apparently was to carry on business of any and every description that can be done under the sun. Apparently in 1906 this company considered the advisability of starting a branch mill at Fyzabad or its suburbs. It accordingly issued a prospectus and invited the public to subscribe the necessary capital. The present appellant put in an application in the ordinary form in which the following condition was entered :—“These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad.” The application was entertained by the Directors and shares were allotted, but no mill was started at Fyzabad. Subsequently on the 27th of September, 1909, a resolution was passed by the company that “as there was no prospect of starting a branch factory at Fyzabad, the conditional share-holders may be paid.” In other words, the company, finding that it could not raise sufficient funds to carry on the business of the company at Fyzabad, made up its mind to take the only course that it could honestly take, i.e., to refund the sum it had already taken from the applicant. After this the company failed and went into liquidation. The present appellant's name was on the register of members and he was called upon to pay the balance due on the shares. The court below has held that he is a member of the company and therefore must pay the balance due from him. Hence the appeal. A preliminary objection is taken that the notice required by section 169 of the Companies Act, has not been given within the time prescribed by law, and the time has not been extended. On it being pointed out that the learned Judge of this Court before whom the appeal was presented extended the time for service of notice, it was urged that it was an *ex parte* order and the present case was not a fit one for the granting of such an extension. An affidavit was filed by the appellant to the effect that he had been misled by the legal advice given to him and hence the delay in

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making the appeal and application. We do not deem it necessary to go in detail into this question. The circumstances are peculiar, and in our opinion in such circumstances extension of time ought to be granted and has properly been granted.

In regard to the merits of the case the decision depends upon the question as to whether the condition on which the present appellant applied for shares was a condition precedent to his becoming a share-holder in the company. We have little hesitation, looking to the facts of the case and the subsequent conduct of the company itself, that it was clearly understood by the present appellant and the company that it was a condition precedent that a branch mill should be started at Fyzabad or its suburbs. If it had been otherwise, there would have been no necessity for the company to pass the resolution of the 27th of September, 1909. It appears that the company wished to raise funds locally and the persons living in Fyzabad were willing to subscribe provided that a mill was started there. The learned advocate for the respondents admits that if the condition is a condition precedent, as stated above, the appellant is entitled to succeed. In view of the facts stated above we have no hesitation in saying that the condition was a condition precedent. The appellant is not a member of the company, but apparently is a creditor and entitled to get back what he has already paid. We allow the appeal and set aside the order of the court below. His name will be removed from the list of contributories. The appellant will get his costs in both courts.

*Appeal allowed.*