

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

JAGANNATH PRASAD (OBJECTOR) v. THE U. P. FLOUR AND OIL MILLS COMPANY LIMITED (OPPOSITE PARTY)\*

1916  
February, 29.

*Act No. VI of 1882 (Indian Companies Act), sections 61, 125, 151—Company—Winding up—Contributory—Liability of contributory for calls.*

Once a member of a Company is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the company being wound-up, that is to say, to the extent of his original share held in the company which remains unpaid he is liable to contribute to the assets of the company, for payment of the debts due to creditors and the expenses of the winding-up under section 61 of the Indian Companies Act, 1882. He is therefore liable in respect of unpaid calls, even though, as against the company the realization of such calls may have become barred by limitation. *Sorabji Jansetji v Ishwardas Juggiwandas Store* (1) and *Vaidiswara Ayyar v. Siva Subramania Mudaliar* (2) followed.

THE facts of the case were as follows :—

The U. P. Flour and Oil Mills Company, was started as a limited company in 1904, with 2,000 shares of Rs. 50 each, Jagannath Prasad, the appellant in the High Court, applied for and was allotted 25 shares, and paid Rs. 10 per share. Subsequently the company made further calls for the balance of the share-money, which were not paid, and suits for recovery of such unpaid calls were alleged to have become time-barred sometime before 1913. In 1913, the company was, on a creditor's application, ordered to be wound up by the court and a liquidator was duly appointed. A list of contributories was prepared, and the name of Jagannath Prasad was also entered in that list without any objection on his part, and the amount of his liability was stated there to be Rs. 1,000. When called upon by the court, at the instance of the liquidator, to pay the said sum into court, Jagannath Prasad raised, *inter alia*, an objection, that the claim was time-barred. The District Judge overruled the objection. Jagannath Prasad appealed to the High Court.

Pandit *Kailas Nath Katju*, for the appellant :—

The claim of the liquidator in respect of unpaid calls which had been made by the company before the date of the winding-up

\*First Appeal No. 180 of 1915, from an order of Mubarak Husain, Officiating District Judge of Cawnpore, dated the 5th of June, 1915.

(1) (1895) I. L. R., 20 Bom., 654. (2) (1907) I. L. R., 31 Mad., 66.

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had become time-barred under article 112 of the Limitation Act, and should not have been allowed. The liquidator stood in no better or higher position than the company. He was merely substituted for the company. He could only recover what was in fact due to the company whether from share-holders or any other persons; *Waterhouse v. Jamieson* (1). Section 61 of the Indian Companies Act of 1882 did not enlarge the liability of the share-holders, or confer any higher rights upon the liquidator. Under clause (d) of section 61, a member of a company was only bound to pay "the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." A share-holder could not be said to be liable for sums which as against him had become time-barred long before the winding-up. Otherwise, unpaid calls which had been made, say, fifty years ago, could be recovered by the liquidator. The cases of *Sorabji Jamsetji v. Ishwardas Jugjiwan Das Store* (2) and *Vaidiswara Ayyar v. Siva Subramania Mudaliar* (3) were no doubt against the appellant, but both the cases proceeded upon the decision in *Re Whitehouse and Company* (4). That was a case where a contributory was claiming a set-off. The present question did not arise there at all, and it was submitted that the observations of JESSEL, M. R., in that case should be read in the light of, and with reference to, the facts before him. The right to set-off was expressly denied by section 61, cl. (g). It was not correct to say that the winding-up gave rise to a new liability altogether. The liability of the members of the company was defined by section 61, cl. (d), and that in terms excluded claims to recover unpaid calls which had become time-barred years before the winding-up. The mere fact that the name of the appellant had been entered upon the list of the contributories did not conclude the matter. The question was whether he was liable to pay a certain sum demanded from him by the liquidator, and that point could only be raised when such demand was in fact made and not earlier. The Companies Act provided a simpler procedure for the investigation of claim under the winding-up, but the claim of the liquidator was in all its incidents a suit by the company which was provided for by article 112 of the Limitation Act. (Reference was also

(1) (1870) 2 H. L. S. and D., 29.

(2) (1895) I. L. R., 20 Bom., 654.

(3) (1907) I. L. R., 31 Mad., 66.

(4) (1878) 9 Ch. D., 595.

made to sections 124, 125, 151 and 166 of the Companies Act of 1882).

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent :—

The present proceeding was under the summary procedure provided by the Companies Act, and was not a suit by the company and article 112 of the Limitation Act had no application. The present claim did not arise out of the contractual liability of the appellant to the company, but was founded on the liability imposed by the statute on the contributories to contribute to the assets of the company. The appellant had been declared to be a contributory, and that order having become final he could not now dispute the present claim. Liability to contribute arises only on the winding-up of the company and not earlier, and it extended to the whole amount which remained unpaid on the shares, and the fact that such amount had already been called by the company was entirely immaterial. (He referred to sections 124 and 125 of the Indian Companies Act of 1882.)

Pandit *Kailas Nath Katju*, replied.

PIGGOTT and WALSH, JJ. :—In our opinion this appeal must be dismissed. A question of principle has been raised apparently for the first time in this Court, namely as to whether an unpaid call, due from a share-holder of a company, which has become statute-barred under article 112 of the Limitation Act, and has therefore ceased to be a recoverable debt by the company, may yet be recovered if at any date subsequent to its having become time-barred the company is wound-up. That question really depends upon the nature of the liability of a contributory and the provisions of the Indian Companies Act relating to winding-up. We entirely agree with the contention put forward by the appellant's counsel that so far as the recovery of the original debt based upon calls made by the company which has become time-barred is concerned, the liquidator has no higher right than the company. The company could not sue for these calls, no more can the liquidator. But the proceeding before us, as has been pointed out by the learned counsel for the respondent, is not a suit at all. What has happened is that in the performance of his duty the liquidator has put the appellant on the list of

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contributories. Once a member of the company is upon the list of contributories,—unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories,—he is liable for all those matters in respect of which he may be charged in the event of a company being wound-up, that is to say, to the extent of his original share held in the company which remains unpaid, he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of the winding up under section 61 of the Indian Companies Act, No. VI of 1882. Now it is necessary to refer to section 125 of that Act in order to ascertain the nature of that liability. Section 125 provides as follows :—“The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.” Now it is quite clear that the contribution dealt with under section 61, which is in itself a sort of correlative duty to the right which a share-holder has to have his liability, for any debt or expense of the winding up which the company may have incurred, limited to the amount of his original subscription, is not in itself a debt. But the Act says that for the purpose of recovery the amount shall be deemed to be a debt payable at the time or respective times when calls are made, and section 151 gives a court, power to make calls from persons on the list of contributories for the amount for which they are shown as liable in the list prepared by the liquidator ; so that really it is not even the right of a company which is being enforced by a liquidator. It is a statutory right of the creditors of a company to enforce against the contributories of an insolvent company through the court the obligation which the share-holders took upon themselves when they originally subscribed in the event of insolvency subsequently overtaking the company. In our opinion the two decisions in *Sorabji Jamsetji v. Ishwardas Jugjiwandas Store* (1) and in *Vaidiswara Ayyar v. Siva Subramania Mudaliar* (2), referred to in the judgement appealed against were right, and were in

(1) (1895) I. L. R., 20 B.M., 651. (2) (1907) I. L. R., 31 Mad., 66.

accordance with the principles on which this question has always been considered under the English law and ought to be followed by us. We dismiss this appeal with costs.

*Appeal dismissed.*

## FULL BENCH.

*Before Justice Sir George Knox, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.*

SOMWARPURI (PETITIONER) v. MATA BADAL AND OTHERS  
(OPPOSITE PARTIES)\*

*Act (Local) No. II of 1903 (Bundelkhand Alienation of Land Act), section 17—Mortgage executed by Collector.—Stamp—Act No. II of 1899 (Indian Stamp Act), section 8.*

*Held* that a mortgage executed by a Collector under the provisions of section 17 of the Bundelkhand Alienation of Land Act, 1903, is not exempt from stamp duty.

THIS was a reference by the Board of Revenue under section 57 of the Indian Stamp Act, 1899, under the following circumstances. A decree upon a mortgage was passed by a munsif against Mata Badal, who was a member of an agriculturist tribe to whom the Bundelkhand Alienation of Land Act, 1903, applied. The munsif accordingly transferred the execution of the decree to the Collector under the provisions of section 17 of the said Act, and the Collector offered the decree-holder, Mahant Somwar-puri, Secretary of the Akhara Niranjani, a usufructuary mortgage of the judgement-debtor's property for twenty years in full satisfaction of the decree. The decree-holder accepted this offer and the Collector thereupon executed a mortgage-deed in accordance with the powers conferred upon him by the Act.

On this reference—

Mr. A. E. Ryves, for the Government :—

The document does not require any stamp. This is an ordinary Civil Court decree transferred under the Code of Civil Procedure to the Collector for execution. If the Collector had executed a lease it would not have required any stamp. It will not be equitable to demand stamp-duty twice, as for this very sum due stamp-duty had once been paid. There is a further

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\* Civil Miscellaneous No. 316 of 1915.