APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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June, 16.

F. B. POWELL (OPPOSITE PARTY) *v.* S. SEN AND OTHERS (APPLICANTS)*.

Company—Winding up—Contributory—Application for allotment of shares made by alleged contributory under conditions which were not carried out by the Company.

A, who was the holder of fifty shares in a limited liability Company, entered into an agreement with the Company through its managing director to take 150 more shares, on the conditions *(a)* that he was to be appointed a "terminal director" of the Company and *(b)* that the business of the Company was to be transferred from Meerut, where it had been formed, to Saharanpur. The 150 shares were allotted to A, but he never paid the allotment money, and, though the business of the Company was, nominally at least, transferred to Saharanpur, A was never appointed a director. Shortly after this allotment the Company went into liquidation.

Held that A could not be made a contributory in respect of the 150 shares which he had offered conditionally to take. *The London and Provincial Provident Association, Ld.*, in re *Mogridge* (1) referred to.

THIS was an appeal from an order made by the District Judge of Meerut allowing an application made by the liquidator of the Bharat Ice Association, Limited, Meerut, that the name of the appellant, Mr. F. B. Powell, should be placed on the list of contributories. The facts of the case are fully set forth in the judgement of the Court.

The Hon'ble Sir *Sundar Lal* and Dr. *Surendra Nath Sen*, for the appellant.

Mr. *Nihal Chand*, for the respondents.

PIGGOTT and WALSH, JJ. :—We think this is a clear case and that this appeal must be allowed. Mr. Powell is entitled to have his name removed from the list of contributories. The circumstances of the case are as follows :—Sometime in 1912 a company of the name of the Bharat Ice Association, Limited, began to carry on business in Meerut, where it may be supposed that under proper management it had a reasonable prospect of success. It appears to have been starved from the outset, and, although it did a considerable amount of business in the way of obtaining share-holders and its books were kept with scrupulous care, it

*First Appeal No. 89 of 1916, from an order of L. Johnston, District Judge of Meerut, dated the 15th of April, 1916.

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made no ice. Provisions were contained in the articles of association for the appointment of directors. One only is important, namely, that with regard to what were called Terminal Directors, in other words, directors appointed for a specific period. By article 177 (*e*), it was provided that the qualification for holding the post of a Terminal Director should be the holding of two hundred shares in the said company. Mr. F. B. Powell, a zamindar of Saharanpur, against whom this application was made, had originally become a share-holder in the month of December, 1912, to the extent of fifty shares. The company was never in possession of sufficient working capital, and in fact was unable to take delivery of the necessary machinery to carry on the business, and was indebted for a fairly substantial loan from the Standard Bank. Under these circumstances it was clearly necessary for the company, if it was in future to carry on business, to raise further capital, and a resolution on the 2nd of February, 1913, was passed by the Board for the purpose of increasing the capital. These circumstances are important, if not vital, to a consideration of the question on which this application really turns, because they throw considerable light on the probabilities and on the conduct of both the main actors to this transaction. The managing Director was one Mr. Kapur, and we are satisfied—the evidence is really conclusive on the point—that, if he was not the sole person who did any business for the company at this time, at any rate he was appointed by the Board of Directors their agent for obtaining any further capital in pursuance of the resolution of the 2nd of February, 1913. He was expressly authorized to make such terms as he could for the extension of the credit of the company, and it is quite clear that his position was such that the company seeking to avail itself of any contract made in its interest by Mr. Kapur would be bound by the terms of such contract so long as it was not *ultra vires* of the memorandum and articles of association. He seems to have carried out his duties with industry. He secured a large number of new share-holders though for very small amounts, but substantially it may be said that the results of his efforts were of no real benefit to the company in securing them sufficient funds to transact any serious business. It was therefore essential from the point of view of

the company, to secure a substantial share-holder, and under these circumstances Mr. F. B. Powell was selected for the purpose, and eventually, as the Judge has found and as the evidence of Mr. Kapur testifies, Mr. Powell agreed to take 150 additional shares on the understanding given by Mr. Kapur that the works of the company would be removed to Saharanpur and that Mr. Powell should become a Terminal Director. There really can be no doubt as to the existence of this condition. Two features of the transaction have been pointed out in argument. In the first place when Mr. Powell applied for 150 shares, he did not send the application money. That conduct at any rate was consistent with the transaction being incomplete. He was already a share-holder to the extent of fifty shares and his application was for 150 further shares, which was exactly the qualification under article 177 (*e*) necessary for the appointment of a Terminal Director. It is uncertain when he paid his application money, or whether he ever paid it in full; but he did pay Rs. 62. His application was dealt with at a meeting of the Board and it was decided to allot him 150 shares the numbers of which were given. On the 17th of March, a resolution was passed which is remarkable in its terms, viz., that "as a special case 150 shares which were specified by numbers should be allotted to Mr. Powell if his application money is received in Rs. 75 only." An allotment letter was sent to him calling upon him to pay a further sum of Rs. 75 on allotment, that is to say, in addition to Rs. 75 payable on application without which an allotment could never have been made at all, such amount due on allotment being payable under the altered articles of the company, and he was given ten days to pay the allotment money. One other fact may be stated, namely, that in the case of other share-holders who had applied unconditionally for small amounts which they wanted to take in the company their names had been entered in the resolution allotting particular numbers to them without any condition at all. Nowhere was that done in the case of Mr. Powell's 150 shares. Mr. Powell never paid his allotment money. On the same day, namely, on the 17th of March, the Directors at the Board meeting resolved to call an extraordinary general meeting for the election of Mr. Powell as Terminal Director of the company, a circumstance

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which further corroborates the view which the Judge below and we ourselves take of the transaction. No further Board meeting was ever held. The resolutions of the 17th of March were never confirmed. Mr. Powell was not appointed a Director. He did not pay his allotment money, and for all practical purposes the business of the company came to a stop at or about this date. At any rate shortly afterwards viz., in the month of May, Mr. Kapur himself applied for the liquidation of the company, its substratum having practically gone. We are satisfied that the conduct of both parties in this case, the Board of Directors and Mr. Kapur representing them on the one hand and Mr. Powell on the other, are conclusive and inconsistent with any other view than that the terms on which Mr. Powell became a share-holder for these 150 shares were that the business of the company should be transferred to Saharanpur, as it was in fact transferred from the 1st of April, and that he should become a Terminal Director. That is the finding at which the learned Judge arrived, and we agree with it. It is equally clear that the condition has not been fulfilled. Whether it was impossible of performance, or whether it was not fulfilled from some neglect on the part of Mr. Powell of which we see no evidence is immaterial. The only question is whether the condition is binding upon the company or not. If it is binding, the company not having fulfilled it, Mr. Powell is under no obligation. Several points have been argued. It is suggested that it was *ultra vires*. There is no evidence that it is *ultra vires*. It is suggested that it was not communicated to the Board. That is immaterial. If the Board choose to give authority on such matters to their Managing Director, they are bound by the contract which their Managing Director may make so long as it is not *ultra vires*.

One other contention was raised, namely, that Mr. Powell accepted the letter of allotment without repudiating it. It is perfectly true that if a man binds himself by unconditional contract to take shares, and there is delay about the allotment, but it is eventually made, and he says nothing about the delay, when it is made he must be taken to have consented to it, and if liquidation supervenes, he cannot escape liability by reason of the delay to which he raised no objection. That has no bearing upon

this case. The arrangement with Mr. Powell was that he should be made a Terminal Director. The Directors had fixed a date for an extraordinary general meeting necessary for the purpose of his election. The allotment letter was merely one step which was necessary to complete the transaction. There is no reason to suppose that it was not the intention of both parties to carry out the bargain which they had made. We see no reason why Mr. Powell should have repudiated at that stage.

One further point was raised, namely, that it was necessary for Mr. Powell to qualify himself by becoming a holder of two hundred shares before he could be nominated a Director. There is nothing in the articles requiring anything of the kind. It is suggested that under recent legislation the qualification must be acquired within two months of the appointment and that this imports the view that he should under the then existing law have obtained his qualification before nomination. We think that the converse is really the case. It is a provision in favour of the company intended to put some terminal point to the controversy as to whether a man who has been *de facto* appointed Director and who *bonâ fide* intends to qualify himself can be considered in the eyes of the law to be *de jure* Director. The contention is really a fallacy, because if it was necessary for a man to qualify himself for his nomination by entering into a firm contract and becoming a share-holder, the result would be that the company would find it difficult to persuade anybody to take a large number of shares on that understanding, inasmuch as if the undertaking was not carried out, he would be bound to pay for his shares and would have a possibly inadequate remedy against the limited company for damages for breach of their undertaking, a proposition which from a business point of view would appeal to very few. We think there is no substance in the contention. It would be detrimental to the interests of the successful carrying on of a company if that were in fact the law. The learned Judge finds the facts in favour of Mr. Powell, a finding with which we entirely agree. He appears to have failed to apply the right principle. He seems to have treated the case as a claim by Mr. Powell against the company for not having carried out their undertaking and he has found in so many words that Mr. Powell

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is really in default for not having interested himself in the company more than he did. It is due to Mr. Powell to say that we see no ground for the view which the learned Judge has taken. Mr. Powell was under no duty, until he was appointed a Director, to take any part in the business of the company, nor indeed had he any right to do so. We think this is really a clear case. There does happen to be one authority which is remarkably like it, namely, the case of *The London and Provincial Provident Association (Limited)*, in re *Mogridge* (1). There are two circumstances in that case which in our opinion make it a stronger case in favour of the liquidator than the present case, namely, (1) that the whole of the transactions were carried out on behalf of the company only by the secretary, and (2) that the proposed share-holder really wanted to get out of his bargain because he had discovered that the company was in low water and it was a mere accident that the company sought to impose some additional terms on the original bargain. We think that the decision is a clear authority for this case according to English Law and that in this respect, the law in this country is not different.

The appeal must be allowed. Mr. Powell must have his costs in this Court and in the court below out of the estate. So far as the application of the liquidator to put Mr. Powell on the list of contributories is concerned, Mr. Powell's name must be struck off the list. Mr. Powell through his counsel has behaved very handsomely in withdrawing his claim with regard to Rs. 75 and therefore we have nothing to say about that. Mr. Powell's costs are not to include any costs of serving as respondents to this appeal share-holders other than the liquidator of the company, and the Standard Bank of India must pay its own costs. The liquidator of the Bharat Ice Association, Limited, and of the Standard Bank will pay their own costs out of the respective estates of the companies they represent.

Appeal allowed

(1) [1888] 57 L. J., Ch., 932.