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or before such settlement, and unless there has been a consequent failure of justice.

On a re-consideration I am, therefore, of opinion that the observation made in the last portion of the judgment in *Ram Das's* case, in which I concurred, did not lay down the correct law.

Sulaiman, C. J.

KENDALL, J. :—I concur.

BY THE COURT :—In our opinion, it is open to the High Court or a District Judge to transfer a case pending in a subordinate court to another court which has pecuniary jurisdiction to try the suit, although it may not at the moment possess territorial jurisdiction to try it. We accordingly direct that this case be laid before the learned Judge who has referred it to this Bench, for disposal on the merits.

PRIVY COUNCIL.

HANSRAJ GUPTA AND OTHERS (APPLICANTS) *v.* N. P. ASTHANA AND OTHERS (OPPOSITE PARTIES).

*J.C.** 1932 *July*, 28.

[On appeal from the High Court at Allahabad.]

Company—Winding up—List of contributories—Invalidity of contract to take shares—Register of shareholders—Company Rules (Allahabad High Court) rules 57, 58—*Indian Companies Act (VII of* 1913), *sections* 105, 156.

If at the commencement of the winding up of a company under the Indian Companies Act, 1913, a person is on the register of shareholders with his knowledge and consent, the invalidity under section 105 of the Act of the contract in pursuance of which he applied for and was allotted shares is not a ground for removing his name from the list of contributories, because after the winding up his liability in respect of the shares arises *ex lege*, namely under section 156 of the Act, and not *ex contractu*.

Semble that the period of 30 days mentioned in rule 58 of the Company Rules of the Allahabad High Court, as that

*Present: Lord BLANESBURGH, Lord RUSSELL of KILLOWEN, Lord SALVESEN, Sir GEORGE LOWNDES, and Sir DINSHAH MULLA.

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within which an application must be made to remove a name from the list of contributories, does not commence to run unless and until the notice contemplated by rule 57 has been served.

Decree of the High Court, vide I. L. R., 52 All., 406, affirmed, but on different grounds.

APPEAL (No. 127 of 1930) from a decree of the High Court (November 20, 1929) rejecting the appellants' application to remove their names from the list of contributories in the winding up of a company, in respect of certain shares.

The appellants were executors of the will of Lala Raghumal, who died on the 5th September, 1926, and is hereinafter referred to as the testator. The respondents were the official liquidators of the Dehra Dun Mussoorie Electric Tramway Co., Ltd., hereinafter referred to as the Company, which on the 29th January, 1926, was ordered to be wound up.

By a verbal contract made on the 12th August, 1922, the terms being stated in a letter from the Company dated the 13th September, 1922, the testator, who was already a shareholder in the Company, agreed to take additional shares to the face value of Rs.1,25,000, and in consideration thereof the Company agreed to place through him the orders for materials required for their tramway. In pursuance of the contract the testator, on the 12th August, 1922, had applied for shares of the above face value; the shares were allotted to him and he was entered in the register of shareholders in respect of them. On the 13th September, 1922, he paid to the Company the money due on application and allotment, amounting to Rs.31,250.

The Company having failed to place its orders for materials through the testator, the appellants, as his executors, claimed in the liquidation damages for breach of the contract above referred to. The claim was rejected by the High Court (MUKERJI and

YOUNG, JJ.) on the 14th May, 1929, the learned Judges holding that the contract was illegal under section 105 of the Indian Companies Act, 1913.

On the 5th July, 1929, the appellants made the application which gave rise to the present appeal, praying that their names should be removed from the list of contributories with regard to the shares.

The application was heard by MUKERJI and YOUNG, JJ.) on the 14th May, 1929, the learned Judges held that the application was time barred by rule 58 of the Company Rules of the Allahabad High Court, the notice referred to in rule 57 not being necessary in the circumstances of the case; they held, further, that the application failed upon the merits as there was a valid contract to take the shares, the contract by the Company with regard to the materials being a separate and collateral contract the performance of which was not made a condition precedent to the contract to take the shares. The proceedings are reported in I.L.R., 52 All., 406.

The facts appear more fully from the judgment of the Judicial Committee.

The appeal was heard together with appeal No. 86 of 1930. The arguments relating to the present appeal, shortly stated, were as follows:

1932, June 16, 17, 20, 21. *Lionel Cohen*, K. C., and *Wallach* for the appellants: The application was not time barred by rule 58 of the High Court Rules, because the period of 30 days thereby prescribed runs from the service of the notice required by rule 57, and that notice was not given. It was *res judicata* by the judgment of the 14th May, 1929, that the agreement appearing from the letter of the 13th September, 1922, was illegal under section 105 of the Indian Companies Act, 1913. The judgment did not treat the agreement to order materials as severable from the agreement to take shares, nor could it be so treated; the agreement as a

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whole was held illegal and void. The agreement being void, not merely voidable, the appellants were entitled to have their names taken off the list, although there was no attempt to rectify the register before the winding up: Buckley on Companies, 11th Edn., p. 236; *Baillie's Case* (1); Indian Contract Act, section 25. In *Elkington's Case* (2), and other English authorities referred to by the High Court, the contract under consideration was not illegal by statute; the ground for removal urged in those cases was merely that owing to the liquidation the company could not perform its part of the bargain.

Pritt, *K. C.*, and *A. R. Thomas*, for the respondents: The application was time barred by rule 58 of the High Court Rules. The appellants having had notice in November, 1926, that they were included in the list of contributories applied to the Court for the postponement of the date for settling the list, and that application was rejected on the 19th July, 1927. In those circumstances no further notice was necessary and the period of 30 days ran from the above date. But even if the present application was not time barred it was rightly dismissed. At the date of the winding up the testator had been on the register of shareholders upon his own application since 1922. By force of section 156 of the Indian Companies Act, 1913, the appellants were necessarily placed upon the list; the section gives rise to a new liability independent of the agreement to subscribe: *Vaidiswara Ayyar* v. *Siva Subramania* (3), following authorities in England. Even if the register is not conclusive the appellants have not shown a right to have their names removed. The validity of the agreement to take shares was not in issue in the earlier proceedings, nor was its invalidity decided by the judgment. The application and allotment was a complete and valid agreement to

(1) [1898] 1 Ch., 110. (2) (1867) L.R., 2 Ch. App., 511.
(3) (1907) I.L.R., 31 Mad., 66.

take the shares. The High Court rightly held that the agreement to order materials was at most the inducement for the agreement to take the shares. Further, the testator being a party to the agreement cannot seek relief on the ground of its illegality: *Scott* v. *Brown, Doering McNab & Co.* (1), and other cases cited in Smith's Leading Cases, 15th Edn., Vol. I, p. 415.

Lionel Cohen, K. C., replied.

July, 28. The judgment of their Lordships was delivered by Lord RUSSELL of KILLOWEN:

In this appeal, and in another appeal (No. 86 of 1930), in which the same parties are concerned, the relevant facts cover much common ground, and they were accordingly heard together.

Lala Raghumal (who will be referred to as the testator) was a shareholder in a company (herein called the company) named the Dehra Dun Mussoorie Electric Tramway Company, Limited, which was incorporated under the Indian Companies Act, 1913, on the 23rd August, 1921. He carried on business under the style of Madho Ram Hardeo Das at Calcutta and under the style of Madho Ram Budh Singh at Delhi.

On the 23rd February, 1922, he entered into a contract in writing with the company (modified in some respects at a later date) by which he agreed to supply large quantities of tramway construction material to the company. Clause 16 of this contract was in the following terms:—

"The company shall pay to the contractors by way of advance when the contractors have placed the orders in accordance with the terms of paragraph No. 6 above, 25 per cent. of the value of such materials for which firm orders shall have been placed as aforesaid by the contractors. Any amount of advance or advances so paid shall be deducted from the final payments for the respective materials as in paragraph No. 13 above."

(1) [1892] 2 Q.B., 724 (728).

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On the same date a sum of Rs.27,000 was paid to the testator, and a letter was written to him, signed by one Beltie Shah, as managing agent on behalf of the company, in which it was stated that :—

"We have today paid you Rs.27,000 (rupees twenty-seven thousand) by way of an advance and this amount will be deducted from your bill for the second shipment. Your receipt for the above amount will be understood to have been given on acceptance of these terms."

A receipt dated the 23rd February, 1922, was given on behalf of the testator for this sum of Rs. 27,000, "being the amount of advance for the order for rails placed with us by them in terms of their letter. . . dated the 23rd February, 1922. This amount is to be adjusted hereafter from our bills for supply of rails."

Some correspondence took place later in the year between the parties relative to this sum, but the contract between the parties in relation thereto must, their Lordships think, be sought only in the documents of the 23rd February, 1922.

On the 12th August, 1922, a conversation took place between the testator and Beltie Shah, as a result of which the testator signed or authorised the signature on his behalf of two forms (dated the 12th August, 1922) applying for further shares in the company. By one form he applied for 10,000 ordinary shares of Rs.10 each; by the other he applied for 250 preference shares of Rs.100 each. It will be sufficient to set out the terms of the application form for the ordinary shares. It was addressed to the directors of the company and ran thus :—

"Having paid to the company's agents, the Messrs. T. Beltie Shah Gilani, the sum of rupee one per share on ten thousand ordinary shares of Rs.10 each in the above company, I request you to allot me that number of shares, upon the terms of the company's prospectus, dated 15th August, 1921, and I hereby agree to accept the same or any smaller number of shares that may be allotted to me, and to make further

payments thereon in accordance with the prospectus, and I authorize you to register me as the holder of the said shares."

Although the forms state that moneys have been paid, no payment in respect of the shares was in fact made until the 13th September, 1922.

What exact agreement was come to on the 12th August, 1922, can only safely be gathered from the terms of the following letter (No. 3452/M.H.), which is dated the 13th September, 1922, addressed to the testator's firm, and signed by the secretary of the company :—

"With reference to the arrangements arrived at in Calcutta with your principal, Lala Raghumal, when the latter agreed to take additional shares of the face value of Rs.1,25,000, the applications for which you have already submitted in consideration for the same, we hereby agree to place our orders for materials required for the tramway through you and to give you consideration of all reductions which may be obtained either by you or by us on any tender submitted to our Consulting Engineers for the respective materials aforesaid.

"It is understood that you will pay us now the application and allotment money for these shares and that the balance of money on these shares will be payable by you on or after April, 1923, either by giving us credit in the invoices for materials or by cash payments. The orders for the material aforesaid will not be placed by you unless and until our Consulting Engineers approve of the respective firms or suppliers. All other conditions relating to this arrangement will be the same as already exist between us by virtue of the agreement, dated the 23rd February, 1922.

"This arrangement includes orders to be placed by us for the proposed extension between our present terminus at Mussoorie and the Library. It is understood that the proposed extension will be carried out as and when the company decides."

On the same day the company wrote two other letters to the testator, agreeing to give him 10 per cent. commission on certain tramcars and equipments for which orders had already been placed elsewhere. On the same day there was paid to the testator out of the

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company's funds a sum of Rs.35,000, for which a receipt was given in the following terms :—

"Received from the Dehra Dun Mussoorie Electric Tramway Company, Ltd., the sum of Rs.35,000 (Rupees thirty-five thousand) only, being advances for orders placed with us as per their letter No. 3452/M.H. of date.

"Dated the 13th September, 1922."

On the 13th September, 1922, the application and allotment moneys payable in respect of the shares covered by the application forms were paid to the company by the testator. The shares were allotted, and the testator was entered in the share register of the company as the holder of the said 10,000 ordinary shares and 250 preference shares, which will be hereafter referred to as the shares now in question.

The company failed to perform its obligations under either of the contracts above referred to, with the result that in the month of August, 1924, the testator instituted in the High Court of Calcutta a suit (No. 2251 of 1924) claiming damages and other relief in respect of the breaches by the company of the said contracts. Before this suit came to trial the company was ordered to be wound up by the High Court of Allahabad, the commencement of the winding up being the 29th January, 1926.

The testator died on the 5th September, 1926. The five appellants in the appeal No. 86 of 1930 are his executors.

On the 25th November, 1926, the official liquidators of the company served a notice on the testator's executors that the list of contributories of the company would be settled on the 7th January, 1927, and that the executors were included in the list in respect of the shares now in question.

In January, 1927, the executors applied to the Court at Allahabad asking (1) for permission to continue the suit No. 2251 of 1924, and (2) that their names should not be put on the list of contributories until

that suit had been disposed of. On the 19th July, 1927, the application, in both its branches, was refused.

The executors therefore brought forward their claims for breaches of contract in the liquidation. Judgment on them was delivered on the 14th May, 1929, by MUKERJI and YOUNG, JJ. In respect of the claim to damages for breach of the earlier contract there was awarded to the claimants as damages a sum of Rs.7,884, with interest at 12 per cent. per annum from the 1st July, 1923, to the date of the winding up of the company. In respect of the claim to damages for breach of the later contract, the learned Judges held that the contract was an illegal agreement, being in contravention of section 105 of the Indian Companies Act, 1913, with the result that, although there had been a breach on the part of the company, the claimants could recover no damages.

Meanwhile, on the 26th March, 1928, the official liquidators of the company had made an application in the winding up against the executors, by which they sought to recover from them as debtors to the company (amongst other sums) the said two sums of Rs.27,000 and Rs.35,000, and, in addition, a sum of Rs.7,703-13-0, balance shown to be due on an account in the books of the company, which included as debits against the testator the said two sums of Rs.27,000 and Rs.35,000.

Judgment on this application was delivered by the same learned Judges on the 14th May, 1929. They held, apart from the question whether any part of the claim was barred by limitation, (1) that the sum of Rs.27,000 was only an advance towards price and not a deposit or earnest money, and that the liquidators were entitled to recover it, but that the executors were entitled to set off against it the damages awarded to them as aforesaid; (2) that the sum of Rs.35,000 was paid also by way of an advance towards price and not as a deposit or earnest money, and that the liquidators

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were entitled to recover it; and (3) that they were also entitled to recover the balance on account of Rs.7,703-13-0.

Upon the questions of limitation their findings were as follows: As to the sum of Rs.27,000, they held that it became repayable at the end of June, 1923, when the company made default in taking delivery of goods, and that accordingly the period of limitation (whatever it might be) commenced to run on the 1st July, 1923; that article 51 of the first schedule to the Limitation Act applied and that accordingly the period of limitation would not expire until the 1st July, 1926. As regards the sum of Rs.35,000, they held that the contract under which it was paid being illegal, the money became immediately repayable as money had and received on the 13th September, 1922. If the company had known of the transaction, then article 62 would apply and the period of limitation would expire on the 13th September, 1925. They found, however, that the company was never aware of the payment, and that either article 95 or article 120 applied, with the result that the period of limitation would not expire at the earliest until the 13th September, 1928. As regards the balance of Rs.7,703-13-0, they held that the period of limitation began to run on the 31st March, 1924, the end of the year of account, with the result that under article 85 the period did not expire until the 31st March, 1927.

It will be observed that in the case of each of the three items the learned Judges found that the period of limitation had not expired, but was still current at the date of the commencement of the winding up, viz., the 29th January, 1926. Upon that footing they held that all three sums were recoverable, upon the ground that the rule of limitation would cease to apply to any debt not already barred at the commencement of the liquidation. "If any claim happens to be within limitation when the winding up commenced,

there would be no further application of the rule of limitation." In the result they allowed the claims of the official liquidators for recovery of the three sums, amounting altogether to Rs.69,703-13-0, with simple interest at 9 per cent. per annum, from the 31st March, 1924, to the date of the claim, with interest upon the aggregate amount (viz., Rs.94,710-2-0) at 6 per cent. per annum until realisation.

The next event was a petition presented to the High Court at Allahabad by the executors, praying that their names might be removed from the list of contributories of the company with regard to the shares now in question, and further praying that the sum of Rs.31,250 paid as application and allotment moneys with regard thereto might be paid to the executors, with interest thereon at 12 per cent. per annum.

The foundation for this application was (not unnaturally) the fact that the Court had already adjudicated upon the agreement entered into on the 12th August, 1922, and the 13th September, 1922, and had in proceedings between the same parties pronounced it to be illegal and void. Judgment was pronounced by MUKERJI and YOUNG, JJ., on the 20th November, 1929. The learned Judges held that the application was out of time, not having been made within 30 days of the 19th July, 1927, being the date on which the Court had refused the application of the executors to postpone the placing of their names upon the list of contributories until their suit in the High Court of Calcutta had been disposed of. This decision turned upon a question of construction of the Allahabad High Court Rules under the Indian Companies Act. The application was, however, also considered on the merits and dismissed, upon the ground that there existed a valid contract to take the shares to which the illegal agreement was only collateral.

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The two appeals which have been presented to His Majesty in Council and have been argued before the Board may now be defined. The one (No. 127 of 1930) was presented by four of the testator's executors against the liquidators and the remaining executor, and seeks to reverse the High Court's decree dismissing the application in regard to the list of contributories. The other (No. 86 of 1930) was presented by all the executors against the liquidators, and seeks to reverse the decree of the High Court passed in accordance with the judgment which allowed the claims of the liquidators to the three sums of Rs.25,000 Rs.37,000 and Rs.7,703-13-0.

There has been no appeal from the High Court's decree upon the claims of the executors in the liquidation for damages for breaches of contract.

Their Lordships have deemed it advisable to reserve further consideration of appeal No. 86 of 1930, but they do not consider it necessary to delay dealing with appeal No. 127 of 1930.

Upon that appeal it was contended (1) that it had been decided as between the parties in other litigation that the arrangements of the 12th August, 1922, and the 13th September, 1922, constituted one indivisible contract, which was illegal and void; (2) that these matters were *res judicata*; and (3) that since the contract to take shares was void, the executors were under no liability in respect of the shares, but were entitled to have their names removed from the list of contributories, and to have the application and allotment moneys repaid.

Other arguments were advanced, but, in their Lordships' opinion, this appeal should be dismissed upon one short but sufficient ground. They will assume in favour of the appellants that the matters claimed to be *res judicata* were *res judicata* within the Code of Civil Procedure, but although they are prepared to make this assumption, they desire to state clearly that they do

not assent to the view of the High Court that the contract in question contravened the provisions of section 105 of the Indian Companies Act. But even with this assumption made in their favour, the appellants cannot, in their Lordships' view, succeed. Whatever may have been the rights and liabilities of the testator before the winding up intervened, the position was altered by the happening of that event. At the commencement of the winding up he was and had for over three years been entered on the register of shareholders as the holder of the shares now in question, with his full knowledge and assent. On the winding up, section 156 of the Indian Companies Act came into play. His liability under that section in respect of the shares was absolute and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding up his liability in respect of the shares arose *ex lege* and not *ex contractu*. It was conceded that the position of the executors was no better than that of the testator. In their Lordships' opinion, this point disposes of the first appeal, which should accordingly be dismissed. This view renders it unnecessary to consider whether the application was out of time. Their Lordships, however, think it right to state that, as at present advised, they are unable to understand how the period of 30 days mentioned in rule 58 of the Rules before-mentioned can have commenced to run unless and until the notice contemplated by rule 57 had been served. This admittedly was never done.

Their Lordships will humbly advise His Majesty that this appeal (No. 127 of 1930) should be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents Nos. 1 & 2: *Cardew Smith & Ross.*