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KULWANT SAHAY, J.

Ghosh(1) that the words "it must be assumed" italicized in the above quotation from my judgment should read "it must *not* be assumed". Perhaps I was not very explicit in my language. I meant to point out that had the plaint in the previous suit been produced and it appeared from it that the Sahus sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own the plea of res judicata could have been sustained, but that as they did not do so their Lordships assumed that Bakhtaur Mull was impleaded as a prior mortgagee under the provisions of section 96 of the Transfer of Property Act. I maintain that there was no misprint in the report of my judgment in *Lal Behari Singh's*(2) case, the original of which I have referred to, and I adhere to the view then expressed by me.

Appeal allowed.

APPELLATE CIVIL.

Before Ross and Scroope, JJ.

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v.

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Companies Act, 1913 (*Act VII of* 1913), *sections* 156 (1) (i) *and* 186—*intention to forfeit shares not carried into effect—whether forfeiture in law—share-holders, whether liable to contribute—Company, right of, to realise calls barred by limitation—liquidator, whether entitled to recover—representatives of share-holders, liability of, limited to assets in their hands—section* 186.

*Appeals from Original Orders nos. 209, 212 and 213 of 1928, from an order of Rai Bahadur Amar Nath Chatterji, District Judge of Gaya, dated the 11th of August, 1928.

(1) (1929) I. L. R. 9 Pat. 118.

(2) (1923) I. L. R. 2 Pat. 485.

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On the 4th February, 1920, a resolution by the Directors of the respondent company was passed in the following terms:

"resolved that the third call upon the shares at 25 per cent. be made according to law and the notices of at least three weeks be given to the share-holders for payment thereof."

Nothing seems to have followed from this resolution, and on the 9th of September, 1922, a notice was issued for payment of the third call which stated that

"in case of failure in payment the directors will be obliged to take other steps for the realisation by forfeiture or otherwise as the case may be."

Then on the 1st of September, 1923, a notice was issued on the appellants to the following effect:

"Dear Sir, Please take notice that as per resolution of the directors of this Bank passed at a Meeting held on 21st February, 1923, (which was confirmed at the Annual General Meeting of the share-holders of this Bank held on the 14th March, 1923) those share-holders who have not yet paid up the third call with interest due against them, are requested to pay up the same within six weeks from the date of service of this notice failing which the shares held by them will be forfeited as provided by the Indian Companies Act, VII of 1913. You are therefore requested to pay up Rs. 50 third call for two shares nos. 13 to 14 held by you in this Company together with Rs 7-7-5 interest up to 31st March, 1923, besides current year's interest till date of the payment at 5 per cent. per annum. Herein fail not."

The Minute-book of the Company further showed that there was no further resolution of the Directors declaring the forfeiture. The appellants objected to their inclusion in the list of contributories in the winding up of the respondent Company on the ground that the notice dated 1st of September, 1923, in itself, by reason of its terms, had the effect of forfeiting the shares and that no subsequent resolution of the Directors was necessary for this purpose.

Held, that there was no forfeiture of the shares, although there may have been an intention to forfeit, and that, therefore, the appellants were liable to contribute.

Edinburgh, Leith and Newhaven Railway Company v. *Hebblewhite*(1), *Birmingham Bristol and Thames Junction Railway Company* v. *Locks*(2), *London and Brighton Railway Company* v. *Fairclough*(3) and *Bigg, In re*(4), followed.

(1) (1840) 6 M. & W. 707, 715.
(2) (1841) 1 Q. B. 256.
(3) (1841) 2 Man. & G. 674.
(4) (1865) L. R. 1 Eq. 309.

Woollaston, In re(1) and *Knight, In re*(2), distinguished.

Held, further, (*i*) that the fact that the company could not realize the calls by reason of lapse of time was no answer to the liquidator's claim.

Jagannath Prashad v. *The U. P. Flour and Oil Mills, Co., Ltd.*(3), *Sorabji* v. *Isser Das*(4), *Vaidiswara Ayar* v. *Siva Subramanaya*(5), *Whitehouse, In re*(6) and *Ladies Dress Association Limited* v. *Pulbrook*(7), followed.

(*ii*) that the appellants, who were representatives of the deceased share-holders, were liable to contribute only to the extent of the assets, if any, which came to their hands from the deceased share-holders.

Appeal by the objectors.

The facts of the case material to this report are stated in the judgment of Ross, J.

Rai Gurusaran Prasad (with him *Siveshwar Dayal*, *K. Dayal* and *Chaudhury Mathura Prasad*), for the appellants.

Dhyan Chandra and *Jugal Kishore Prasad*, for the respondent.

Ross, J.—These are three appeals against an order passed by the District Judge of Gaya disallowing the objections of the appellants to their inclusion in the list of contributories in the winding up of the Gaya Bank and Trades Association Company, Limited. This Company is registered under the Indian Companies Act (Act VII of 1913). An order was passed by the High Court on the 23rd of July, 1925, for its winding up.

(1) (1859) 4 De G. & J. 437.
(2) (1867) 2 Ch. App. 321.
(3) (1916) I. L. R. 38 All. 347.
(4) (1895) I. L. R. 20 Bom. 654.
(5) (1907) I. L. R. 31 Mad. 66
(6) (1878) 9 Ch. Div. 595.
(7) (1900) 2 Q. B. D. 376.

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Three points are taken in these appeals. The first is that the shares of the appellants having been forfeited more than a year before the commencement of the winding up, they are not liable to contribute under section 156 (*1*) (*i*). The second point is that the claim is barred by Article 112 of the Limitation Act; and the third is that, in the case of two appellants, their liability, if any, should be limited to the extent of the assets of the deceased share-holders (whose representatives they are) coming to their hands. The principal question is that raised by the first contention; and it is necessary, in the first place, to ascertain the facts.

The shares in question are shares of Rs. 100 each, payable in four instalments of Rs. 25. The first two instalments were paid. It appears from the Minute-Book of the Company that as far back as the 4th of February, 1920, it was

> "resolved that the third call upon the shares at 25 per cent. be made according to law and due notices of at least three weeks be given to the share-holders for payment thereof" (Ex. 1).

Nothing seems to have followed from this resolution. On the 9th of September, 1922, a notice was issued for payment of the third call which stated that

> "in case of failure in payment the directors will be obliged to take other steps for its realisation by forfeiture or otherwise as the case may be." (Ex. *A-1*).

Then comes the notice upon which the appellants rely (Exhibit *B*) dated the 1st of September, 1923. It runs as follows:

> "Dear Sir, Please take notice that as per resolution of the directors of this Bank passed at a Meeting held on 21st February, 1923, (which was confirmed at the Annual General Meeting of the share-holders of this Bank held on the 14th March, 1923) those share-holders who have not yet paid up the third call with interest due against them, are requested to pay up the same within six weeks from the date of service of this notice failing which the shares held by them will be forfeited as provided by the Indian Companies Act VII of 1913. You are therefore requested to pay up Rs. 50, third call for two shares nos. 13 to 14 held by you in this Company together with Rs. 7-7-5 interest up to 31st March, 1923, besides current year's interest till date of payment at 5 per cent. per annum. Herein fail not."

The contention on behalf of the appellants is that on their failure to comply with this notice their shares were forfeited six weeks after the date of service thereof.

The Articles of Association have not been produced; but section 18 of the Act provides that in the case of a Company limited by shares if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the first schedule, those regulations shall, so far as applicable, be the regulations of the Company in the same manner and to same extent as if they were contained in duly registered articles. In the absence of proof to the contrary, therefore, it must be taken that Table A has been incorporated in the articles; and in fact it appears from the letter-book produced in this case that in certain of the printed notices issued by the Company there is a reference to Table A. The notice that I have quoted, by reason of its reference to the provisions of the Indian Companies Act, must, therefore, be taken to contain by implication a reference to the regulations in Table A. Article 24 of Table A provides for the notice by the directors requiring payment of a call. Article 25 provides for the naming of the date, not earlier than the expiration of fourteen days from the date of the notice, on or before which the payment required by the notice is to be made, and requires that it shall state that in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited. Article 26 provides that

> "if the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect."

It seems to follow, therefore, from its terms themselves that the notice had not by its own force the effect of forfeiting the shares. Something more was

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necessary, viz., a subsequent resolution of the directors.

It will be seen that the notice quoted above refers to a meeting of the directors held on the 21st of February, 1923, and to an Annual General Meeting of the share-holders held on the 14th of March, 1923. The Minute-Book shows that at the first of these meetings, i.e., of the 21st of February, 1923, the directors resolved

"that the share-holders who have not yet paid up their call with interest may be asked to pay up the same within a period to be fixed by the managing director according to law, and failing which their shares *may be held to be liable to be forfeited*. But this notice to be issued and the step to be taken after sanction of the share-holders at the Annual General Meeting to be held is obtained, and not otherwise. The question of taking other steps to realize the call be also considered at the annual general meeting of the share-holders."

The Minute-Book further shows that at the aforesaid annual general meeting on the 14th of March, 1923, the following resolution was passed:

"Considered the resolution of the directors made at the meeting held on the 21st February, 1923, as regards realisation of the third call on shares by forfeiture or otherwise. Resolved that the notice of six weeks be issued to the share-holders asking them to pay up the third call with interest, and in case of failure in payment *their shares may be forfeited by a resolution of the directors to be passed hereafter*."

The Minute-Book further shows that no such resolution was ever passed. Thus neither the terms of the notice nor the resolutions of the directors and of the share-holders seem to support the argument that the shares had been forfeited. And there is no other evidence of forfeiture.

But the learned Advocate for the appellants contended, on the authority of *Woollaston's*(1) case and of *Knight's*(2) case, that the notice in itself, by reason of its terms, had the effect of forfeiting the shares and that no subsequent resolution of the directors was necessary for this purpose.

The authorities are thus summarised by Lindley [on Companies, Sixth Edition, at page 728]: "More-

(1) (1859) 4 De. G. & J. 437.
(2) (1867) 2 Ch. App. 321.

over, a declared intention to forfeit not carried into effect, or not duly confirmed, is no forfeiture at all. Still, if there is power to forfeit, and declared intention to forfeit and the shares intended to be forfeited are treated by the Company and the share-holder as forfeited, the Company will be precluded from afterwards insisting that no forfeiture ever took place "; and again at page 1142 " if everything required to be done is substantially done by the Company, and if the shares have been treated both by the Company and by the share-holder as forfeited, the share-holder will not be a contributory ". Then follows a reference to *Knight's*(1) case; and the learned author proceeds: " In the above case, it will be observed that there was power to forfeit, an intention to forfeit, and a notice of that intention: and the intention was actually carried into effect although not with due regularity. But.....an intention to forfeit not carried into effect is no forfeiture at all."

The ordinary rule is that there is no binding forfeiture unless it be declared by the directors: [*See Edinburgh, Leith and Newhaven Railway Company* v. *Hebblewhite*(2)]. This case was followed in *Birmingham Bristol and Thames Junction Railway Company* v. *Locke*(3) where Lord Denman, C.J. said: " It was also objected that the Company had precluded itself from treating the defendant as a proprietor by declaring (through its directors) his shares forfeited for non-payment of former calls. But the forfeiture does not attach till it has been reported to, and sanctioned by, a general meeting of proprietors; and the Court of Exchequer has held that notice of forfeiture does not excuse from payment of calls." In *London and Brighton Railway Company* v. *Fairclough*(4) it was conceded that the objection that the defendant had ceased to be a share-holder, his shares having been declared to be forfeited, was

(1) (1867) 2 Ch. App. 321.
(2) (1840) 6 M. & W. 707, 715.
(3) (1841) 1 Q. B. 256.
(4) (1841) 2 Man. & G. 674.

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answered by the case of *Edinburgh, Leith and Newhaven Railway Company* v. *Hebblewhite*(1).

That being the general rule, *Woollaston's*(2) case may now be considered. The deed of settlement of the Company in that case provided by the 101st clause for notice requiring payment within twenty-one days on pain of forfeiture and that in default of payment it should be lawful for the directors to declare the share to be forfeited. A resolution of the directors was passed that those share-holders who had not fully paid and satisfied their respective calls upon their subscribed shares, should receive notice to do so forthwith and that unless the said shares were fully paid and satisfied within twenty-one days from the date of the notice, then and in such case the said unpaid shares should be irremediably forfeited to the sole and exclusive use of the Company under and by virtue of the 101st clause of the deed of settlement. Thereafter a notice was sent to Woollaston that unless payment was made within twenty-one days, his shares would be irremediably forfeited. Along with this notice was sent a copy of the resolution. It was held that the shares were forfeited and that Woollaston was not liable to contribute. The question was whether this prospective resolution was good or not. Turner, L. J. said: "By this notice they made a plain declaration of forfeiture, to take effect upon a certain event which happened, and for three years this declaration was treated as having taken effect and as being in force. It is argued that the 101st clause does not give the directors power to make such a prospective declaration of forfeiture, but only enables them to declare a forfeiture after the share-holder has been in default for the twenty-one days, and that, in strictness, may be so, but this is a difference of form, not of substance..... The directors had power to declare a forfeiture in the events which happened, they clearly intended that there should be a forfeiture, and though

(1) (1840) 6 M. & W. 707, 715.
(2) (1859) 4 DeG. & J. 437.

their mode of declaring it may have been not strictly regular the variation appears to me to be one of form and not of substance." This case was considered in *Bigg's*(1) case. In that case the directors passed a resolution that notice should be given to share-holders in arrears requesting payment by a certain date and intimating that unless payment was made the shares would be then forfeited without further notice, the notice to contain a recital of the clauses in the Articles of Association relating to forfeiture of shares. A notice was duly given in these terms. Bigg paid the calls on some of his shares and stated at the Company's office that as to the remaining shares he would submit to the forfeiture as provided by the note. The directors subsequently decided that the shares of share-holders who were solvent were not forfeited and among these was Bigg. It was held in that case that Bigg was liable to contribute. Page Wood, V. C. said: "Now I will first remark that the operation of these clauses of forfeiture must be considered to see whether or not some determination on the part of the directors is not first necessary. I apprehend that some direction on the part of the directors is necessary as regards the company, although no operation on the part of the directors is necessary as regards the share-holder beyond giving him the notice." *Woollaston's*(2) case was distinguished on the ground that the notice there was not merely a notice to pay on pain of forfeiture, but also a notice of the resolution of the directors that the shares would be forfeited, and on the ground that the notice was accompanied by a copy of the resolution itself which, as the Vice-Chancellor pointed out "was not only a resolution that the notice should be sent, but it was also a distinct embodiment of the decision of the directors that the shares should, from that moment, be forfeited". It was further pointed out that in that case the subsequent proceedings which took place

(1) (1865) L. R. 1 Eq. 309.
(2) (1859) 4 De G. & J. 497.

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were treated as of considerable importance, as undoubtedly they were; that for three years the parties who received the notice and the company who gave the notice acted upon it and, therefore, evidenced in the best possible manner their intention of proceeding upon it. The Vice-Chancellor said: "The very circumstance that these matters were pressed into the consideration of the case seems to indicate a degree of doubt on the part of the Lords Justices as to what the immediate effect of the notice would have been if it had stood alone." Now the notice in the present case does not incorporate any resolution of the directors forfeiting the shares, nor could it have done so, because no such resolution was ever passed. I have quoted the resolutions, and it is apparent that neither the directors nor the share-holders came to any decision actually forfeiting the shares. The notice in the present case is very similar to the notice of *Bigg's*(1) case; and in my opinion it did not amount to a forfeiture of shares. In *Knight's*(2) case the facts were entirely different from the facts of the present case. There a notice was given requiring payment and stating that in default of payment the shares would become forfeited and the directors would forthwith pass a resolution to that effect, whereupon such shares so forfeited would become the property of the Company. But in that case, after default was made, an entry was made in the book containing the list of share-holders showing that the shares in question had been forfeited and a memorandum was made in the Register of New Shares showing that the shares had been transferred to the Company. Turner, L.J. pointed out that the shares could not have been transferred to the Company and could not have been forfeited to the Company without the resolution of the directors being passed; and it was, therefore, considered that this was sufficient to afford evidence that there was a resolution passed by the

(1) (1865) L. R. 1 Eq. 309.
(2) (1867) 2 Ch. App. 321.

directors to forfeit the shares. Cairns, L.J. said: "On the one hand, to have made these entries without authority would have been a gross breach of duty, or something worse, on the part of the officers who made the entries. On the other hand, if they were made with authority, that authority would be, in substance if not in actual form, the expression of the resolution of the directors to forfeit the shares for non-payment of calls. I, therefore, think that whatever objection there may be in form, there is none in substance to the forfeiture of the shares on the ground of the mode in which the resolution of the directors to forfeit the shares is expressed." It is obvious that the decision in that case turned on the existence of facts which are not present in this case. I hold, therefore, that the present case is not within either *Woollaston's*(1) case or *Knight's*(2) case but falls under the general rule. It follows that the shares of the appellants have not been forfeited and that they are liable to contribute.

This concludes the question of limitation also. Once it is held that the appellants are contributories then the case is governed by the decisions in *Jagannath Prashad* v. *The U. P. Flour and Oil Mills Company, Limited*(3), *Sorabji* v. *Isser Das*(4) and *Vaidiswara Ayar* v. *Siva Subramanaya*(5). The law on this point is perfectly clear and there is no dispute about it. The fact that the calls were barred by time as against the Company is immaterial; as was said by Jessel, M.R. in *In re Whitehouse & Co.*(6), "That is a new liability; he is to contribute; it is a new

(1) (1859) 4 De G. & J. 437.

(2) (1867) 2 Ch. App. 321.

(3) (1916) I. L. R. 38 All. 347.

(4) (1895) I. L. R. 20 Bom. 654.

(5) (1907) I. L. R. 31 Mad. 66.

(6) (1878) 9 Ch. Div. 595.

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contribution. It is a mistake to call that a debt due to the Company. It is no such thing. It is not, as has been supposed, in any shape or way a debt due to the Company, but it is a liability to contribute to the assets of the Company.....It is quite true that a call made before the winding up.....is a debt due to the Company, but that does not affect this new liability to contribution." The distinction is further illustrated by the converse case of *Ladies Dress Association Limited* v. *Pulbrook*(1). There the shares had been forfeited more than a year before the liquidation and it was pointed out that a person in the position of the defendant was liable with regard to unpaid calls, not as contributory, either as present or past member of the company, but as a debtor of the company under the provisions of the Articles of Association [*see* also Article 28 of Table A]. The positions are quite distinct and the fact that the company in the present case could not realize the calls by reason of lapse of time is no answer to the liquidator's claim.

As to the third point it is plain on the terms of section 186 of the Act as well as on the general law that Anant Prasad Varma, appellant no. 3 in Appeal no. 209 of 1928 and Raghubans Sahay, appellant in Appeal no. 213 of 1928 are only liable to contribute to the extent of the assets, if any, which came to their hands from the deceased share-holders Harbans Lal and Bansi Lal and the order of the District Judge must be modified accordingly.

With this modification of the order the appeals are dismissed with costs.

SCROOPE, J.—I agree.

Order modified.

(1) (1900) 2 Q. B. D. 376.