1931

Present : **Akbar J.**

SITHARAM CHETTIAR *v.* UMBITCHY.

207—*C. R. Colombo*, 58,481.

Joint Stock Company—Unpaid capital—Mortgage of debts—Sale in execution—Right of purchaser to recover amount of unpaid shares—Ordinance No. 4 *of* 1861, *ss.* 25, 69, *and* 107.

Where a Joint Stock Company in Ceylon mortgaged " all the assets including all the moneys now due or hereafter to become due to the company in respect of shares sold " and in execution of a decree in an action on the mortgage the following property was sold and conveyed to the purchaser " all the moneys whatsoever due to the company by the several persons enumerated ",—

Held, that capital unpaid cannot be regarded as a debt due to the company from a. shareholder, until a call has been made in accordance with the Articles of Association or by the liquidator in the case of a voluntary winding-up, and that consequently the amount of a call unpaid does not fall within the liability created by the mortgage.

THE plaintiffs sued the defendant for the recovery of a sum of Rs. 250, alleged to be a debt due from the defendant to the Indo-Ceylon Trading Company, which debt the plaintiffs had purchased in execution against the company. The sum of money represented the unpaid capital in respect of hundred shares of the company purchased by the defendant. By bond P1 the company mortgaged to the plaintiffs certain properties as security for the payment of a sum of Rs. 120,000. In addition, the company mortgaged the stock-in-trade, good will, &c., together " with all the assests of the company including moneys now due or hereafter to become due in respect of shares sold ".

A mortgage action was instituted in respect of the bond in D. C., Colombo, 30,968, and in execution of the decree in the action certain property was sold and purchased by the plaintiffs. The assignee appointed by Court in the action executed a transfer in favour of the purchasers. The recitals in the document are set out in the judgment. The operative part sells to the plaintiffs " all the moneys whatsoever due to the company by the several persons enumerated in the schedule . . . . and the full benefit, profit, and advantage that now come or shall or may hereafter be obtained by reason of any action now filed or hereafter to be filed against any persons mentioned. "

The Commissioner of Requests gave judgment for the plaintiffs.

A. E. Keuneman (with him *Sinnatamby*), for defendant, appellant.

F. J. Soertsz (with him *Gratiaen*), for plaintiffs, respondents.

March 2, 1931. AKBAR J.—

This appeal raises an interesting point of law under the Joint Stock Companies Ordinances. The plaintiffs sued the defendant for the recovery of a sum of Rs. 250 alleged to be a debt due from the defendant to the Indo-Ceylon Trading Company, which debt plaintiffs stated they had purchased in execution against this company under decree entered in D. C., Colombo, No. 30,968. The defence raised several points of law, but in the view that I take in this case I need only discuss one point taken by the appellant's counsel and which is referred to in issues 4, 5, 6, and 7. These issues are as follows :—

(4) Was there a debt of Rs. 250 due from defendant to the said company in respect of shares purchased.

(5) If not, can plaintiff acquire any rights as against the defendant by virtue of the execution sale in D. C., Colombo, Case No. 30,968.

(6) Has a proper and valid call been made in respect of the uncalled for portion of the shares purchased.

(7) If not, is defendant liable to pay for the same.

This debt of Rs. 250 was said to be due from the defendant in respect of 100 shares of the company purchased by the defendant at Rs. 10 per share. He had already paid Rs. 5 per share on allotment and a further Rs. 2·50 on a call. The Rs. 250 claimed in this case represent the Rs. 2·50 per share still due by the defendant in respect of these shares. For the purpose of the point referred to by me above, I need only mention the fact that by bond marked PI dated October 30, 1925, the Indo-Ceylon Trading Company mortgaged to the plaintiffs in this case certain properties as security for the payment of a penal sum of Rs. 120,000. As security the company mortgaged in addition to the stock in trade goods, &c., lying in the premises No. 14, Baillie street, Fort, Colombo, and the good will of the company the following property " together with all the assets of the company including all moneys now due or hereafter to become due to the company in respect of shares sold ". By this bond the company further mortgaged " all the book and other debts now due and owing and hereafter to become due and owing to the said company ". A mortgage action was filed in respect of this bond in D. C., Colombo, No. 30,968, and the document P2 dated August 7, 1929, filed in this case purports to be a transfer by an assignor, one Hettige Don John Peiris, who recites in the document the fact of the mortgage bond P1, the fact of the action 30,968 brought by the plaintiffs in this case against the company, and that a decree was obtained on December 10, 1928, and the fact that the said H. D. J. Peiris was appointed assignor by the Court to carry out the sale of the property mortgaged, and then the document P2 proceeds as follows :—

> " And whereas the said assignor on May 11, 13, and 14, 1929, put up for sale the said book debts and unpaid and uncalled shares and at such sale the said Seena Kana Roona Seena Seena Thana Sinnathamby Chettiar and Seena Kana Roona Seena Seena Muttiah Chettiar, the plaintiffs above named (hereinafter called and referred to as the assignees) became the purchasers of the debts and unpaid and uncalled shares due to the said company by the persons mentioned in the said schedule for the price or sum of Rupees Three thousand Eight hundred and Forty-eight and Cents Eighty (Rs. 3,848·80). "

After these recitals the operative part of this document P2 states that the assignor sells to the plaintiffs in this case the following property :—"All the moneys whatsoever due to the said company by the several persons enumerated in the said schedule hereto and all interest now due and may hereafter become due

on the same and the full benefit, profit, and advantage whatsoever that now can or shall or may hereafter be obtained by reason or means of the same or of any action now filed or. hereafter to be filed against all or any of the persons mentioned in the said schedule and all the right, title, interest, claim, and demand whatsoever of the said assignor or of the said Indo-Ceylon Trading Company, Ltd., or of the said Odeon Talking Machines Company in, to, and upon the same."

By the Articles of Association the directors were given the right to borrow money and for that purpose to mortgage the assets and property of the company "including its uncalled or unissued capital." By paragraph 15 of the Articles, the directors were authorized to make such calls as they think fit upon the members in respect of all moneys unpaid on their shares and each member, subject to receiving two months' notice at least, specifying the time and place for payment, was bound to pay the amount of calls so made, to the persons, at the times and places appointed by the directors. By Article 16 a call was deemed to have been made at the time when the resolution of directors authorizing such calls was passed. It was admitted at the trial that the company went into voluntary liquidation and that Mr. H. T. Ramachandra was appointed liquidator on March 26, 1928, and that he has made no calls as yet for the balance due on the shares. It was also admitted that the directors had not issued a call for the balance due as provided by the Articles of Association, but it was argued for the respondent that the letter of demand sent by the plaintiffs' lawyer on September 1, 1929, to the defendant for the payment of the sum of Rs. 250 was sufficient in law to enable the plaintiffs to recover this sum.

The short point argued by Mr. Keuneman on the facts I have stated above was this: He argued that by P1 what was mortgaged was debts actually due to the company or hereafter to become due to the company and that the uncalled for amounts due on the shares would not come within this expression as such sums would not become due to the company until a requisition had been issued under Article 15, either by the directors or by the liquidator. He further argued that what was conveyed by P2 by the operative part of the document was only the moneys actually due at the time to the company, and that P2 did not convey any right to the uncalled for balance due on shares. Mr. Keuneman in support of his argument quoted several authorities from the English law. In the case of *Whittaker v. Kershaw*,[1] Cotton L.J. stated as follows :—" But there was no debt until a call was made. There was only a liability which might become a debt."

The facts of this case were to some extent similar to the facts here. Then the judgment proceeds "Then it is said that a call constitutes a debt from the time when a man becomes a shareholder. I am of opinion that it does not, and that there is no debt till the call is made. We were referred to the Companies Act, 1862, section 16, which enacts that "all moneys payable by any member to the company in pursuance of the conditions and regulations of the company or any of such conditions or regulations shall be deemed to be a debt due from such member to the company ; and in England or Ireland to be in the nature of a specialty debt". They are to be a debt ; but when are they to be a debt ? When they become payable according to the regulations of the company ; and by the articles the shareholder is only called upon by the directors to do so. There is, therefore, no debt until a call is made. We were also referred to section 75, which enacts that "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 (in England and Ireland of the nature of a

[1] 60 *L. J.* 9.

specialty) 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 ". But that section only applies when the company is being wound up, and we have no winding-up here. There is a marked distinction between sections 16 and 75. There was then in the present case no debt existing when the executors paid over the residue.

In the case of *Johnson v. Russian Spratta Patent, Limited,*[1] a limited company having power to borrow money upon debentures charging its " property " both present and future including its uncalled capital, issued debentures charging its undertaking " and all the property to which it now is or shall at any time hereafter become entitled ". The company afterwards went into liquidation ; and it was held that the expression " property " in the debentures did not include the capital of the company uncalled at the commencement of the liquidation.

Lindley M.R. stated as follows :— " We have been considering this matter, and we have all come to the conclusion that although, in a sense, uncalled capital may be called property, yet it is property of a very peculiar description. After all, it is not a debt. It is a right to make a call and create a debt ; and it is rather stretching the meaning of the word ' property ' to make it include such a right as that. When we look at the decisions we see that for years past, and in all the text-books to which professional men have recourse, it had been considered that in this class of document, namely, debentures of limited companies, the word ' property ' will not include uncalled capital. We are not prepared to depart from that line of decision. "

In the case of *In re Cawley & Co.,*[2] Lord Esher M.R. stated as follows during the course of his judgment :— " But it has been strenuously argued that there was a good call on December 18 ; and, as the question has been argued, I do not hesitate to express my opinion upon it. My opinion is, that there was no call whatever made on December 18. In order to make a call within the Articles of Association, we must see what is necessary to be done to make a call. In the first place, there must be a resolution of the directors. They cannot do such a thing as make a call without a resolution. Then what is to be done in passing a resolution to make a call ? Article 38 says the time and place for payment must be stated. His Lordship read the article, and proceeded :— Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board ; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board. "

[1] (1898) 2 *Ch. D.* 149.
[2] (1889) 42 *Ch. D.* 209.

In the case of *Re Westminster Syndicate, Limited,*[1] a debenture holder whose security was upon uncalled capital applied in the liquidation alone of the company that a person nominated by himself with the approval of the owners of subsequent mortgages comprising uncalled capital, might be allowed to recover the calls. It was held that there was no precedent for such an order, and that there was serious objection to the proposed innovation.

Neville J. stated as follows :—" It appears that it has been the practice for some time past, where a receiver has been appointed, in a debenture-holders' action against a company in liquidation, if uncalled capital is included in the security, to allow, in proper cases, the receiver, upon giving the liquidator a proper indemnity, to use the name of the latter for the purposes of recovering the calls made by him. I see no objection

[1] *XCIX. L. T.* 924.

to the continuation of this practice. In the present case, the application is in the liquidation alone by a debenture-holder, whose security is upon uncalled capital, that a person nominated by himself, with the approval of the holders of subsequent mortgages comprising uncalled capital, be allowed to recover the calls. From inquiry I have made it appears that there is no precedent for such an order and it appears to me that there are serious objection to the proposed innovation."

In the case of *Fowler v. Broad's Patent Night Light Company*,[1] the headnote is as follows :—" When a company is ordered to be wound up, the power of its directors, under its constitution, to make calls on shares *ipso facto* comes to an end, and the only power to make calls is that which is by statute given to the liquidator acting in the winding-up. Therefore where uncalled capital has been charged by the company in favour of debenture-holders, and the company is ordered to be wound up, the Court has no jurisdiction to order either a receiver appointed in an action brought to enforce the debentures, or the liquidator, to make a call in the action, but can only order the liquidator to make the call in the winding-up. The receiver in the action may, however, be empowered to take proceedings in the name of the liquidator for getting in the call."

The following is an extract from the judgment of Vaughan Williams J :—" I have looked into this matter, and have satisfied myself that I have no jurisdiction to make the order asked for in the debenture-holders' action. I have already said that, according to my view, the applicant will ultimately be entitled to have a call made for the benefit of the debenture-holders.

" Having regard to what has passed between the debenture-holders and the liquidator, the plaintiff is entitled to have the assistance of the liquidator in making these calls so as to get in the uncalled capital ; but I do not see any power in me to make the order on an application in the debenture-holders' action. I am clear that the moment you have got a liquidation, the call-making power is limited to the statutory power of making calls in a winding-up and that the original power of the directors to make calls *ipso facto* comes to an end.

" The only way in which I can give effect to the rights of the debenture-holders, with regard to the uncalled capital, is by means of an application in the winding-up ; but, after what I have said, I do not anticipate the liquidator will object to the application being amended by intituling it in the winding-up, as well as in the action. The liquidator must take the proper steps for making the call and enforcing it, and the applicant must give him a sufficient indemnity. It may be that the agreement of compromise sufficiently provides for the payment of any costs to be received by the liquidator ; if not, the form of indemnity must be settled in Chambers."

It will thus be seen that according to the English law uncalled capital was not regarded as a debt due to the company, and further, the only persons who could make calls were the directors in strict compliance with the Articles of Association or in the case of a company which is being wound up by the liquidator. Until such a call was made the liability of the shareholder could not be described as a debt. It was the practice in England for debenture-holders having security over uncalled capital where a receiver was appointed in the action to ask the assistance of the liquidator in the winding-up but it was the liquidator who made the calls, and even then the applicants had to give sufficient indemnity. This power of making calls could not be delegated except under an express power to delegate given to the directors or unless such power is expressly given by statute as in the case of liquidators when the company is being wound up (see the cases collected under paragraph 271 of

[1] (1893) 1 *Ch. D.* 724.

the 5th volume of the *Laws of England*). The law applicable in Ceylon is under Ordinance No. 11 of 1866, the English law, and the Joint Stock Companies Ordinance, No. 4 of 1861. The relevant sections of the Ordinances are section 12, section 25, section 69, section 89, and section 107 (6). Under section 12 the Articles of Association bind shareholders as if they were parties to the articles. But the contract of the shareholders with the directors, under Articles 15 and 16 in this case, was a contract to pay moneys due on the shares, only when a call was made by a resolution of the directors giving the shareholders two months' notice and indicating when and where and to whom the money was to be paid. Under section 25, it will be seen that in Ceylon it is only when a call has been made, in the manner provided by the articles, that the amount of the call remaining unpaid is to be deemed to be a debt due from the shareholder to the company. Under section 69 when a company is being wound-up either by order of Court or voluntarily, the shareholders are liable to contribute only such a sum as is sufficient to pay the debts, &c., of the company and the costs, &c., of the winding-up. It is significant that the word " debt " is not used, but the word "liability". When a company is being wound-up by order of Court under section 89, the Court is given the power to make calls, and only to make such calls as will be sufficient to satisfy the debts, &c., of the company, and it is only after such calls have been made that the obligation of the shareholder is to be deemed a debt due to the company. Under section 107 (6), in the case of a voluntary winding-up, the liquidator is given the power to make a call on the shareholders, but only in such sums as may be sufficient to pay the debts, &c, of the company, and the costs of the winding-up.

It will thus be seen that Mr. Keuneman's argument is unanswerable. Until a call is made in terms of Article 15, by the directors, or until a call is made by the liquidator when the company is being wound-up, the liability of the defendant did not amount to a debt. The document P1 did not empower the company to mortgage uncalled capital because the relevant extract from P1 is as follows :— " All the assets including all moneys now due or hereafter to become due to the company in respect of shares sold. " The uncalled capital cannot become due until a call is made in the manner mentioned by me above, and no such calls having been so made, the liability of the defendant did not come within the mortgage bond P1. Further, under P2, which is the document of title, under which plaintiffs claim to base their action, what was sold to them was nothing more than " all the moneys due to the said company, " and no money was due to the company by the defendant at the time P2 was executed.

It seems to me that the plaintiffs, apparently through ignorance, have set about the wrong way to recover the sum of Rs. 250, which the defendant agreed to contribute only if a call was made in proper form and, therefore, the defendant is entitled to succeed in his appeal. I allow the appeal and dismiss plaintiffs' action with costs in this Court and the Court below.

Appeal allowed.