Privy Council Appeal No. 77 of 1939

Ernest Hugh Canning and others – – – – *Appellants*

v.

Soobran Partap (deceased) and another – – – *Respondents*

FROM

FULL COURT OF THE SUPREME COURT OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MARCH, 1941

Present at the Hearing:

LORD ROMER
LORD JUSTICE LUXMOORE
LORD JUSTICE GODDARD

[*Delivered by* LORD JUSTICE LUXMOORE]

On the 21st October 1938 Mr. Justice Boland ordered that the New Dome Oil Fields Ltd. (hereinafter called "the Company") should be wound up by the Supreme Court of Trinidad and Tobago under the provisions of the Companies Ordinance Chapter 180.

This order was made upon a petition presented by leave of the Court by Soobran Partap and Ramessar Partap on the 9th September 1938.

On the 9th November 1938 Manoel Joaquium de Silva a creditor of the Company who had opposed the making of the winding-up order appealed against such order and on the 23rd November 1938 the Full Court of the Supreme Court of Trinidad and Tobago dismissed this appeal on the ground that it was incompetent because de Silva had intervened in the winding-up proceedings subsequent to the date of the winding-up order. On the 14th November 1938 Philomena Fernandez who claimed to be a creditor of the Company and as such had opposed the making of the winding-up order gave notice of appeal against such order while on the 6th December 1938 Ernest Hugh Canning and Jacinto Francisco Xavier who respectively claimed to be creditors of the Company and had also opposed the making of the winding-up order gave separate notices of appeal against that order. On the 17th December the Full Court of the Supreme Court of Trinidad and Tobago dismissed these appeals.

On the 17th January 1939 Philomena Fernandez Ernest Hugh Canning and Jacinto Francisco Xavier (hereinafter called "the appellants") obtained conditional leave to appeal to His Majesty the King in Council and on the 16th May 1939 final leave to appeal as aforesaid was obtained.

The material facts are as follows:—

The Company was incorporated as a private company under the Companies Ordinance Chapter 180 on the 3rd May 1930. The nominal capital of the Company is $100,000 of which $38,975 was stated to have been issued as paid up or credited as paid up but no information is to be found in the documents nor were Counsel able to give any information at the hearing before this Board with regard to the number if any of the shares which had been issued for cash. The main object for which the Company was established was to take over as a going concern the oil mining lease and

operations including machinery and plant and other implements and tools used in such mining operations which were then vested in the Administrator-General of the Colony of Trinidad and Tobago as the representative of Alfred Ralph Sammy deceased who carried on business under the style of the Dome Oil Fields. The property taken over by the Company included two leases dated respectively the 18th February 1928 whereby certain oil petroleum mines and minerals were demised to the said Alfred Ralph Sammy for the respective terms of 21 years from the 18th February 1928 subject to the payments of the rents and royalties and to the conditions and stipulations therein respectively mentioned. Each of the said leases reserved a power of re-entry if an assign of the said A. R. Sammy being a corporation should go into liquidation whether voluntary or compulsory except for the purpose of reconstruction or amalgamation. The lessors who granted the leases were Moorali Dar the said Soobran Partap Sahoodar and Ramessar Partap. Both Moorali Dar and Sahoodar were dead before the petition for winding-up of the Company was presented and at the date of such presentation Soobran Partap was the legal personal representative of each of such deceased persons. The respective properties comprised in the said leases were duly assigned to and vested in the Company for all the unexpired residues of the respective terms originally created It is admitted that after the acquisition of the leasehold properties the Company was without funds to enable it to carry on the undertaking and consequently on the 21st May 1930 the Company borrowed $40,000 from the said de Silva. The terms of the loan appear to have been extremely onerous, for the Company gave as security therefor a specific charge upon (*a*) the unexpired terms under the leases acquired by it (*b*) the oil boring and other machinery then affixed to the leasehold properties and (*c*) a debenture securing to de Silva the repayment of the $40,000 without interest and charging by way of floating security the undertaking of the Company and all its assets. The fact that no interest on the $40,000 was secured by the debenture is explained by the fact that as a term of the loan the Company agreed to pay de Silva a bonus by way of royalty on the oil won from the leasehold properties in addition to an annual sum of $12,000 during the residue of the respective terms created by the leases. The Company also covenanted to deposit at its Bankers in the joint names of the Company and de Silva a sum equal to 4 per cent. of the gross proceeds of the sale of all minerals won from the demised premises and that any moneys for the time being standing to the credit of this account should be applied from time to time at the option of de Silva in repayment to the extent required by him of the $40,000 or on account of any other moneys secured to de Silva in respect of his loan. At the same time de Silva and his assigns were appointed to be receiver or receivers of the Company's business. It is plain that from the date of this loan the Company was completely under the control of de Silva. He admittedly remained in the position of receiver of the Company's business until the order for winding-up was made. In June 1934 there was a variation with the concurrence of de Silva of the royalties payable to the lessors under the leases of the 18th February 1928 but the details of this variation are immaterial. de Silva has never since his appointment as receiver filed any abstract of his receipts and payments as prescribed by Section 95 (1) of the Companies Ordinance Chapter 180.

On the 21st July 1938 de Silva seized under a so-called power to distrain conferred on him by his agreement with the Company all the machinery engines plant and equipment on the leasehold properties and gave notice of his intention to sell the same by public auction on the 15th September 1938. It was this notice which caused Soobran Partap and Ramessar Partap to apply to the Supreme Court for leave to present a petition for the compulsory winding-up of the Company. When this application was made all royalties due to Soobran Partap and Ramessar Partap had been paid and consequently there was no debt directly due and payable to either

of them but each was a prospective and contingent creditor in respect of the future rents and royalties falling due for payment under the leases. The Supreme Court was satisfied that a prima facie case for winding-up had been established and gave leave for the presentation of a petition for that purpose. The petition was presented on the 9th September 1938. It alleged among other things that having regard to the seizure by de Silva of the Company's plant and equipment the Company was not in a position to carry on its business, that six judgments had been obtained against the Company particulars of which were set out in the petition, that the Company was unable to pay its debts and that it was just and equitable that it should be wound up. The hearing of the petition was fixed for the 22nd September 1938. Some six companies and persons gave notice of their intention to appear at the hearing. One of these viz. the Neal & Massy Engineering Company claiming to be a creditor for $198.69 stated in its notice that it intended to support the petition. This debt was paid by de Silva a few days before the hearing. The other five did not state whether they were creditors or contributories but stated that they opposed the petition. At the hearing the Company and de Silva appeared by the same Counsel and the appellants also appeared by Counsel and applied for and obtained leave to oppose the petition. The petition was verified by the usual affidavit in the statutory form deposed to by Soobran Partap. de Silva swore an affidavit in reply. In this affidavit he stated that four of the six judgments referred to in the petition had already been satisfied and that the remaining two would be satisfied directly after taxation of the costs referred to in such judgments and that apart from the two last mentioned judgments he de Silva was the only other creditor of the Company. He further stated that the petition was not presented bona fide. Both de Silva and Soobran Partap were cross-examined upon their affidavits. de Silva's evidence was certainly remarkable in the light of his relationship to the Company. He stated that he had paid the last royalties due to the petitioners with his own cheque because the Company had no funds on the date of payment. He said he had been repaid this amount by the Company but he was unable to say whether the repayment to him was made by cheque or not. He was unable to say what the Company owed to him but that he had distrained upon the Company's assets for about $90,000 and that the Company had not got the money to pay him at present. He was unable to state what the Company owed to Philomena Fernandez. He also stated that he did not know if the Company had as much as $10 in its banking account although as receiver he received all moneys and signed all cheques. The following significant passages appear in Boland's J. note of de Silva's cross-examination: " I do not know if the Company can pay its debts. The Company has not got the money to pay me regularly. I am financing the Company. I loaned the Company $40,000 in 1930. My debt is now more than $94,000. The $94,000 is in addition to the $40,000. I am not pressing for the money. I never made any demand for my money. I distrained on everything." " I financed the Dome. I don't know if they need the finance. If I choose to give them the money I do. If I choose to pay a creditor I pay. They can sue and can get the money. Company owes Xavier for royalty and Mrs. Fernandez too, I suppose for a good many years. They came after me. I have not paid them. The Company will be able to pay Xavier if they sell. I don't know how much cash they have." " I can't tell if this Company owes me $300,000. I don't know how much. It is not $1,000,000. It may be more than $300,000 or it may be less." But perhaps the most remarkable statement made by de Silva was that he did not distrain upon the Company's assets with the intention of selling those assets but in order to induce the people with whom he stated he was negotiating for the reconstruction of the Company to come forward. He stated that the negotiations were on behalf of a new American company but he did not know its name or the name of the persons with whom the negotiations were taking place. He also said " Apparently the negotiations have ceased " and that " In view of the winding-up petition I think those foreign people have gone."

In the light of this evidence Boland J. found that de Silva was de facto the Company and had power to bring it to an end whenever it suited him; that the Company's identity was gone and that people having transactions with the Company would in fact be dependent entirely upon de Silva without realising it beforehand. These findings appear to their Lordships to be fully justified by the evidence. Clearly the Company is unable to pay its debts and having regard to the seizure by de Silva of its machinery and plant it is also unable to carry on its business. It is impossible to suppose in such circumstances that any independent creditor could have any good reason for wishing that the Company should not be wound up. Boland J. after hearing the creditors who opposed the petition rejected the suggestion that the petition had not been presented in good faith and had no hesitation in exercising his discretion in favour of the winding-up of the Company by the Court on the ground that it was just and equitable so to do. The Full Court of the Supreme Court of Trinidad and Tobago expressed their opinion that there were ample grounds upon which Boland J. could and did exercise his discretion and dismissed the appeal with costs. The Chief Justice who delivered the judgment of the Court said that " If ever there was a case in which a winding-up order should have been made we consider this to be one." Their Lordships find themselves in complete agreement with the judgment of Boland J. and of the Full Court. In their opinion the case is one in which no legal principle is involved and in view of the concurrent findings of fact did not warrant the grant of leave to appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty that this appeal should be dismissed and that the appellants should be ordered to pay to the surviving respondent his costs of the appeal.

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In the Privy Council

ERNEST HUGH CANNING AND OTHERS

v.

SOOBRAN PARTAP (DECEASED) AND ANOTHER

DELIVERED BY LORD JUSTICE LUXMOORE

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