27/29

IN THE PRIVY COUNCIL NO. 12 of 1977

ON APPEAL
FROM THE FIJI COURT OF APPEAL

IN THE MATTER OF BALI HAI RESTAURANT LIMITED

and

IN THE MATTER OF THE COMPANIES ORDINANCE CAP. 216

B E T W E E N :

BALI HAI RESTAURANT LIMITED — APPELLANT

and

RAVENDRA KUMAR AND JAFFAR ALI — RESPONDENTS

RECORD OF PROCEEDINGS

Philip Conway Thomas & Co.
61 Catherine Place
London,
SW1E 6HB

Solicitors for the Appellant

RECORD

Alternatively,

(2) Whether or not the Courts below ought to have considered as an alternative to making an Order for winding up of the Appellant Company an Order for the purchase of the shares belonging to the Respondents to this Appeal, either by the Appellant Company or by the shareholders therein other than the Respondents to this Appeal, upon such terms as might be just and equitable.

Pp.1-11 3. By their Petition, dated the 6th day of June, 1975 the Respondents alleged inter alia the following facts and matters:-

Pp. 1 & 2 (a) The Appellant Company was registered on the 13th day of March, 1972 under the Companies Ordinance as a private Company having 50,000 shares of $1 each.

Pp.2 & 3 (b) The Appellant's objects were to carry on business as a restaurant and nightclub and associated objects. It was further alleged that the Appellant Company was carrying on such business in Suva.

(c) The reason for the presentation of the Petition was set out in the following words:-

P.3,11.13-20

> "Your Petitioners desire that the Company be wound up upon the grounds first that the Company is unable to pay its debts and secondly to say that it would be just and equitable that such an Order be made by this Honourable Court having regard to all the circumstances. Particulars of the said grounds are set forth in the succeeding paragraphs of the Petition."

Pp.3-4 (d) The original shareholders and directors of the Company were the first and second Respondents (who held 10,000 and 15,000 shares respectively) and one J.G.B. Crawford and one A. Qumi (who held 15,000 and 10,000 shares respectively).

P.5 (e) Since the beginning of April, 1974 the Appellant Company had failed to pay on the due date various debts.

(f) By paragraphs 17 and 18 it was stated:-

RECORD

"Since the 17th day of May, 1974 your first Petitioner withdrew from active participation from the Board of Directors of the Company and on the 14th day of November, 1974 he resigned from the said Office. P.5,l.19-30

That since the month of July 1974 your second Petitioner has withdrawn from participation on the Board of Directors of the Company. Since then the entire affairs of the Company have been and are being managed and controlled by Mr. J.G.B. Crawford and Mr. A. Qumi. Your second Petitioner resigned from the said Office on the 23rd day of May, 1975."

(g) Circumstances leading to the purported issue of further shares (subsequently held to be invalid) were set out. Pp.6-7

(h) It was contended that the Appellant Company was unable to pay its debts. P.8

(i) Detailed grounds were given in respect of the contention of the Respondents that it was just and equitable that the Appellant Company should be wound up. Pp.9-11

4. An Affidavit in opposition to the Application for the Appointment of a Provisional Liquidator and in opposition to the Petition for Liquidation was sworn by the said J.G.B. Crawford on the 22nd day of July, 1975 and filed on the Company's behalf. In the said Affidavit Mr. Crawford alleged that the Appellant Company was in a good financial position and that it was unjust and inequitable to wind up the Company. Reference was made to a meeting between the Respondents to this Appeal and the said Qumi and the deponent on the 17th day of December, 1974 in the following words:- Pp.28-31 P.29,ll.13-32

"At this meeting Mr. Francis Kumar stated that on the question of the sale of his shares he would ask $15,000 for his $10,000 fully paid up shares and Mr. Jaffar Ali said that he would ask the sum of $30,000 for his $20,000 fully paid up shares. That a sale at such price would have suggested that the Company had increased its nett asset value by fifty per centum." P.30,ll.30-39

RECORD

In his said Affidavit the deponent referred to a further meeting which took place on the 14th day of January, 1975 between the same parties in the following words:-

P.30,l.46-P.31,l.4

> "That at this meeting, Mr. Akuila Qumi and myself were advised by the representative of Mr. Jaffar Ali and Mr. Francis Kumar that they wished to purchase my $19,000 fully paid shares in the Company for $22,500 and Mr. Akuila Qumi's $13,000 fully paid shares for the sum of $15,000."

5. The cases in which a company may be wound up by a Court in Fiji are governed by Section 167 of the Companies Ordinance (Cap.216) of Fiji (hereinafter called "the Ordinance"). This provides

> "A company may be wound up by the court if -
>
> (a) the company has by special resolution resolved that the company be wound up by the court;
>
> (b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting;
>
> (c) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
>
> (d) the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven;
>
> (e) the company is unable to pay its debts;
>
> (f) the court is of opinion that it is just and equitable that the company should be wound up."

Section 169 of the Ordinance provides that an application to wind up a company shall be made by petition. Section 170 of the Ordinance sets out the powers of the Court on hearing such a petition. Sub-section (1) of that Section provides:-

> "On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make

RECORD

any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

6. The Petition of the Respondents herein came on for hearing before Mishra J. on the 15th day of August, 1975. The hearing of the said Petition was adjourned to 12th September, 10th October, 14th November and 27th November 1975, when the learned Judge reserved his Judgment until 19th February 1976. Pp.48-59

7. In his Judgment the learned Judge who had heard the Petition commenced the same by summarising the business and shareholders of the Appellant. The learned Judge then summarised the basis upon which the Petition was presented and opposed and the evidence in support of it. It was held, it is conceded correctly, that a purported increase of share capital was irregular. The learned Judge reached the conclusion, it is submitted correctly, that:- Pp.59-64 P.59,l.27-p.60,l.9 P.60,l.10-P.62,l.39 P.62,ll.27-29

"The affairs of the company has undoubtedly been conducted in a rather informal and unsatisfactory manner. Regular general meetings were not held and returns required to be submitted to the Registrar of Companies were not submitted. Keeping of accounts would also appear to have been unsatisfactory and the auditors who have prepared the company's accounts for submission to this Court have, for some reason, found themselves unable to confer their certificate upon them. These matters, by themselves, may not constitute a ground for winding-up, . . ." P.62,l.40-P.63,l.4

The learned trial Judge then held, it is respectfully submitted wrongly, that such matters ought to be taken into account by a court when considering the "just and equitable" ground. P.63,ll.4-38

8. The learned trial Judge observed that the Appellant Company had not made a profit and commented, it is submitted wrongly, that the Petitioners derived no benefit whatever from the business. He held, it is respectfully submitted P.63,l.38-P.64,l.37

RECORD

incorrectly, that the resignation of the Respondents to this Appeal from their directorships in the Appellant Company did not preclude the Respondents from alleging it was just and equitable that the Appellant Company should be wound up. The learned Judge then allowed the Petition solely on the ground that it was just and equitable to wind up the Company. It is humbly submitted that he fell into error in so allowing the Petition but the Appellant Company submits that the Judge was correct in refusing to allow the Petition on the basis that the Company was unable to pay its debts.

P.63,11.38-48

P.65

9. On 19th February 1976 the learned Judge directed that the Order for winding-up of the Appellant Company be stayed pending appeal.

P.66

10. By Notice of Appeal, dated 27th February 1976, the Appellant herein gave notice of appeal to the Fiji Court of Appeal against the said Order of Mishra J. By its Notice of Appeal the Appellant Company asked that the Order of Mishra J. be set aside and that Judgment be entered for the Appellant Company and the Petition be dismissed or alternatively for an Order that a new trial be heard between the parties. Amongst the Grounds of Appeal raised in the Appellant's said Notice of Appeal was:-

P.67,11.13-16

"THAT the learned Judge erred in assuming that the four shareholders contemplated that the company should be operated on the basis of partnership law."

and

P.67,11.30-36

"THAT the learned Judge failed to take into account the fact that the Petitioners had not exhausted the procedures for meetings of the company and motions to be put to such meetings as provided for in the Companies Ordinance and the Articles of Association of Bali Hai Restaurant Limited."

11. The Appellant's Appeal to the Fiji Court of Appeal came on for hearing before Gould V.P., Spring and Marsack JJ.A., on 16th November 1976 and Judgment was reserved until 26th November 1976.

12. Spring J.A. (with whom Gould V.P. concurred) commenced his Judgment by reciting the relevant

P.68-70

RECORD

facts. The learned Judge of Appeal stated that leave had been sought to place uncertified accounts of the Company before the Court of Appeal but that the application had been refused. With regard to the accounts the learned Judge of Appeal commented:- P.70,ll.36-45

> "It is to be noted that the respondents Messrs. Crawford and Qumi did not give evidence before the Supreme Court, nor were they examined or cross-examined on the uncertified accounts submitted to that Court." P.71,l.43-P.72,l.3

The Appellant respectfully submits that it appears from the Record that they were not required to attend for cross-examination. P.61,ll.13-16

13. After reciting the arguments on behalf of the Appellant and the Respondent before the Court Spring J.A., summarized the question before the Court of Appeal as being:-

> "- was the learned Judge in the Court below correct when he made an order winding up the company on just and equitable grounds." P.72,ll.23-26

The learned Judge continued his Judgment by considering various English Authorities and in particular Ebrahimi v. Westbourne Galleries Ltd. & Ors. (1973) A.C. 360. On this basis the Judge concluded that there was a complete lack of confidence between shareholders. He further concluded that there was a "basic obligation" of equal management participation and that the same was "out of reasonable contemplation". P.76,ll.39-40 P.77,ll.12-14

In so holding, it is respectfully submitted, the learned Judge of Appeal fell into error. It is respectfully submitted that the Court ought to have held that (a) there was no such "basic obligation" in contemplation, and/or (b) that if there was that in the instant case the behaviour of the Petitioners in resigning their directorships and failing to take the steps open to them within the framework of the Company to resolve their differences with the said Crawford and Qumi disentitled them from obtaining the relief granted. In the premises it is submitted that the learned Judge of Appeal was wrong in holding that the Order of the Court below was correct.

RECORD

14. Marsack J.A., disagreed with the Judgments of Spring J.A. and Gould V.P. In the course of his Judgment the learned Judge recited the
Pp.79-81 facts leading to the presentation of the Petition. The learned Judge of Appeal then criticised the findings of the Court below in the following words:-

P.81,ll.12-47 "In his judgment the learned Judge placed considerable reliance on the decision of the House of Lords in Ebrahimi v. Westbourne Galleries Limited (1972) 2 All E.R. 492, and that of the Court of Appeal in Yenidje Tobacco Company Limited (1916) 2 Ch. 426. In the argument before this Court, counsel for the respondent submitted that the principles laid down in those two cases were definitely applicable to the present. But in my opinion, the basis of those judgments - and also of Re Lundie Brothers Limited (1965) 2 All E.R. 692, cited in the argument - is different in one essential respect from the matter before this Court. In each of those cases there was an expulsion of one director, who was thereafter excluded from any share in the conduct of the Company's business; and it was held that this expulsion amounted to such oppressive conduct on the part of the remaining one director (in the Yenidje case) and two directors (in the other two cases) that it was just and equitable for the Company to be wound up. In the present case each of the petitioners withdrew from his part in the management of the Company's affairs of his own volition. No pressure was put on him to resign his directorship; and one of them has gone to live permanently in Canada. The Courts in the three cases quoted held that the Company was analogous to a partnership, and that, as is stated by Lindley on Partnership (6th Ed.) p.657:

> "Continued quarrelling and such a state of animosity as preclude all reasonable hope of reconcilation and friendly co-operation have been held sufficient to justify a dissolution."
>
> That state of affairs does not, in my view, exist here."

RECORD

It is respectfully submitted that the learned Judge of Appeal was correct in so holding. The learned Judge further held that the local conditions were such that the Petition ought to have been dismissed; it is submitted correctly. P.82,11.1-20

15. Marsack J.A. further found that the bona fides of the Respondents to this Appeal was not established. In the circumstances the learned Judge of Appeal would have held, it is submitted correctly, that the deadlock was caused from a recalcitrant attitude on the part of the Respondents. P.82,1.21-P.83,1.15

16. The Appellant Company respectfully submits that the learned trial Judge and the Judges of Appeal ought to have considered whether or not an order should have been made for the purchase of the shares of the Respondents by Crawford and Qumi. In failing to do so it is submitted that the Courts below fell into error.

17. On the 14th day of January, 1977 leave to Appeal to Her Majesty in Council was granted by the Court of Appeal. P.85

18. The Appellant Company humbly submits that this Appeal should be allowed and that the Judgment and Orders of the Fiji Court of Appeal and of the Supreme Court of Fiji should be set aside, and that instead:-

either (a) the Petition of the Respondents should be dismissed, or

(b) that the Respondents should be directed to sell their shares to the said Crawford and the said Qumi at such price as the Supreme Court of Fiji finds just.

And that the Respondents should be ordered to pay to the Appellant its costs of this Appeal and of the proceedings in the Courts below for the following, amongst other,

R E A S O N S

(1) BECAUSE the learned trial Judge and the majority of the Court of Appeal of Fiji failed to take account of or alternatively sufficient account of the failure of the Respondents to obtain redress for their alleged grievances within the Company.

RECORD

(2) BECAUSE the Courts below failed to consider ordering a transfer of shares by the Respondents.

(3) BECAUSE the learned trial Judge was wrong.

(4) BECAUSE the majority of the Court of Appeal of Fiji (Gould V.P. and Spring J.A.) were wrong.

(5) BECAUSE Marsack J.A. was right.

NIGEL MURRAY

No. 12 of 1977

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

IN THE MATTER of BALI HAI RESTAURANT LIMITED

- and -

IN THE MATTER of THE COMPANIES ORDINANCE CAP.216

B E T W E E N :

BALI HAI RESTAURANT LIMITED Appellant

- and -

RAVENDRA KUMAR AND JAFFAR ALI Respondents

CASE FOR THE APPELLANT

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London, SW1E 6HB.

Solicitors for the Appellant