A **GANDABHAI KALYAN HARI AND ANOTHER**

v.

GOULD AND ANOTHER

B [SUPREME COURT, 1964 (Hammett Ag. C.J.), 24th, 25th February, 22nd April]

Appellate Jurisdiction

Estate and Succession Duty—shares—restrictions on transfer—appropriate basis of valuation—presumed market value or nett asset backing—Death and Gift
C *Duties Ordinance (Cap. 171) ss.3, 6(1) (2), 66(1) (3)— Finance Act, 1894 (Imperial) (57 & 58 Vict., c.30) s.7(5)—Finance Act, 1940 (Imperial) (3 & 4 Geo. 6, c.29) s.55—Estate Duty Assessment Act, 1914-1950 (Australia) s.16A (1) (c).*

Valuation—shares—restrictions on transfer—Estate and Succession Duty—appropriate basis of valuation.

At the date of his death the deceased held 11,000 ordinary shares
D of a nominal value of £1 each and 9000 Founders' shares, also of £1 each, in the capital of G. B. Hari and Company Limited. The Articles of Association contained a general restriction on the transfer of all shares save with the consent and approval of the directors. The holders of Founders' shares were not entitled to any dividend but otherwise had the same rights as ordinary shareholders. The company was a private company with an issued capital of £100,000 made
E up of 66,000 ordinary shares and 34,000 Founders' shares. There had been no sales of shares in the company.

The valuation (Ordinary shares £1 each, Founders' shares 5/- each) relied upon by the executors of the deceased was made on the basis of a presumed open market sale of the shares in the company as a going concern, having regard principally to the likely income
F yield but taking into account the nett asset backing. The Official Valuer valued all shares alike at £1.0451 each, on the basis of nett asset value and a notional liquidation.

Held: 1. The restrictions on the transfer of shares and on the Founders' shares were factors to be taken into consideration but did
G not make it impossible to employ the "market value" basis of valuation, or make it necessary or desirable to use the "liquidation value" as a basis.

2. The basis of the valuation made by the valuer for the executors was the correct basis.

H *Semble:* It is only when there are some unusual features in the case e.g. where the deceased shareholder held a controlling interest, or it is not possible to follow any other basis of valuation, that resort should be had to the "asset value" basis.

Cases referred to:

Salvesen's Trustees v. Inland Revenue Commissioners (1930) 9 A.T.C. 43: *Spencer v. Commonwealth of Australia* (1907) 5 C.L.R. 418: *Attorney-General of Ceylon v. Mackie* [1952] 2 All E.R. 775: *Federal Commissioner of Taxation v. Sagar* (1946) 71 C.L.R. 421: *Abrahams v. Federal Commissioner of Taxation* (1944) 70 C.L.R. 23: *Commissioner of Stamps v. Haynes* [1924] G.L.R. 271: *New Zealand Insurance Co. Ltd. v. Commissioner of Inland Revenue* [1956] N.Z.L.R. 501: *In re Crawford (deceased), Public Trustee v. Commissioner of Stamp Duties* [1942] N.Z.L.R. 170: *Inland Revenue Commissioner v. Crossman* (sub. nom. re Paulin; re Crossman) (1935) 152 L.T. 98.

Appeal under section 66 (3) of the Death and Gift Duties Ordinance, against valuation of shares.

D. M. N. McFarlane for the appellants.

A. D. Leys for the first respondent (the Official Valuer).

K. C. Gajadhar for the second respondent (the Commissioner).

HAMMETT Ag. C.J.: [22nd April, 1964]—

This is an appeal under Section 66 (3) of the Death and Gift Duties Ordinance, by way of Originating Summons by the executors of the Estate of Hiralal Gangaram Hari, deceased, against the valuation, for Estate Duty and Succession Duty purposes, of the Official Valuer of shares held by the Estate in the capital of a private company.

The deceased died on 15th November, 1961, and at the date of his death held 11,000 Ordinary Shares each of £1 Nominal Value and 9,000 Founders' Shares each of £1 Nominal Value in the capital of "G. B. Hari & Company Limited".

This is a private company, registered in Fiji, where it carries on business with an issued capital of £100,000 made up of 66,000 Ordinary Shares of £1 each and 34,000 Founders' Shares of £1 each.

The Articles of Association contain a general restriction on the transfer of all shares in the Company save with the Directors' consent and approval. The Memorandum contains a further restriction on the Founders' Shares. The holders of Founders' Shares are not entitled to any dividends, although in all other respects, such as voting etc., the holders of Founders' Shares have exactly the same rights as the holders of Ordinary Shares.

Mr. R. S. Kay, a Chartered Accountant practising in Suva, on behalf of the executors valued the Ordinary Shares of the Company at £1 each and the Founders' Shares at 5/- each at the date of death. The basis of his valuation was on a presumed open market sale of the shares in the Company as a going concern, having regard principally to the likely income yield of the shares but also taking into account, *inter alia*, the actual nett asset backing of the shares. These valuations were not acceptable to the Commissioner of Death and Gift Duties.

Mr. S. Gould, a Chartered Accountant also practising in Suva, in his capacity as the Official Valuer then made his valuation of the shares. In his opinion the value of both the Founders' Shares and the Ordinary Shares alike was £1.0451. He did not consider it was possible to value these shares on the "Stock Exchange" method principally owing to the unusual capital structure of the Company, which was a family concern and to the existence of these Founders' Shares which had no right to dividends. In his opinion, the only possible basis of valuation was the nett asset value basis. He valued the shares on the basis that the Company notionally went into liquidation on the death of the deceased.

The executors did not accept that valuation and have appealed to this Court against it, under the provisions of Section 66(3) of the Death and Gift Duties Ordinance on the following grounds:

> "1. That the valuation made the 23rd day of July, 1963, by the Official Valuer in respect of the shareholding of the late Hiralal Gangaram Hari in G. B. Hari & Co. Ltd. is erroneous.
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> 2. That the Official Valuer valued the shares on a wrong basis.
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> 3. That the value of £1.0451 placed on a Founders' share by the Official Valuer is excessive.
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> 4. That the said valuation be not adopted by the Commissioner of Death and Gift Duties.
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> 5. That the value of the ordinary shares held by the deceased in G. B. Hari & Co. Ltd. be fixed at £1 per share and that the value of the Founders' shares held by the deceased in the said Company be fixed at 5/- per share."

Estate Duty is imposed by virtue of Section 3 of the Ordinance which reads:

> "In the case of every person who dies after the commencement of this Ordinance, whether in Fiji or elsewhere, and wherever the deceased was domiciled, there shall be payable to the Crown on the final balance of the estate of the deceased as determined in accordance with this Ordinance a duty (hereinafter called estate duty) at the rate and in accordance with the provisions prescribed by this Ordinance."

The method by which the final balance of an estate shall be computed is prescribed by Section 6 which reads:

> "6. (1) The final balance of the estate of the deceased shall be computed as being the total value of his dutiable estate after making such allowances as are hereinafter authorized in respect of the debts of the deceased and in respect of other charges.
> (2) All such property shall be valued as at the date of the death of the deceased save that where by the last preceding section it is provided that the local situation of any such property shall be determined as at any other date, the value of that property shall be determined as at the same date."

In computing the final balance of this estate it is necessary to arrive at the "value" of these shares but nowhere in the Ordinance is a definition laid down of what is meant by the word "value" in this connection.

Section 66 (1), which reads as follows, refers to the word "valuation" but does not in fact define the word "value":

> "For the purpose of assessing death duty or gift duty, if the Commissioner is not satisfied as to the value as stated by the administrator or donor, as the case may be, of any portion of the dutiable estate of the deceased or any portion of the subject of a gift, he may determine it either by agreement between himself and the administrator in the case of death duty or between himself and the donor in the case of gift duty or, in the event of a failure to agree, by a valuation made by an official valuer appointed under the Stamp Duties Ordinance."

In all the cases to which I have been referred, whether they have been English, Australian or New Zealand authorities, the definition of "principal value" as set out in the Finance (Imperial) Act 1894 Section 7 (5) appears to have either been followed, or adopted, and in none of these cases has it ever been doubted or challenged. This definition reads as follows:

> "The principal value of any property shall be estimated to be the price which in the opinion of the Commissioners such property would fetch if sold in the open market at the time of the death of the deceased."

This definition of "value" was not challenged by either party in this case. It was further conceded by both sides to this appeal that the standard method of valuing for estate duty purposes, shares in a public company which are quoted on a recognised stock exchange, is by reference to the price at which such shares changed hands on the Stock Exchange on the date of death. This standard method is, of course, subject to variation in cases where extraordinary or exceptional circumstances arise.

That is the practice which has in fact always been followed in Fiji. In my opinion, it is the only possible and practical practice to follow and gives the proper construction to the words "value" and "valuation" in the Death and Gift Duties Ordinance in this connection.

If shares quoted on a stock exchange are properly valued by reference to the "market value" or the actual price at which sales between a willing seller and a willing buyer in the open market took place on the Stock Exchange on the date of death, it appears to me to be only logical that shares not quoted on a stock exchange should if at all possible be valued on the same basis and on the same principle.

This value can only be estimated. In making this estimate reference must be made to prices at which recent sales, if any, actually took place and to the trading practices and history of the concern and to its actual financial position both past and present and its likely future financial prospects as is revealed by its balance sheets and profit and loss accounts, subject to expert interpretation thereof by persons who have knowledge not only of accounts but also of the circumstances, conditions and environment in which the Company carries on its business. One of the relevant factors in such a valuation is, of course, the nett asset backing of the shares. *Salvesen's Trustees v. Inland Revenue Commissioners* (1930) 9 A.T.C. 43.

Such a market value is not the same as the "break-up" value or the shares "nett asset" value or "notional liquidation" value.

This is conceded by the Official Valuer. He agrees that if in fact it was proper to value these shares at the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay, then Mr. Kay did take into account all the considerations which ought to have been taken into account. The Commissioner does challenge the quantum of some of the allowances made by Mr. Kay but he does not otherwise challenge his actual calculations or the matters he has taken into account.

The issues in this appeal are therefore twofold:

Firstly: Should the valuation of these shares be, as contended by Mr. Kay, arrived at on the "willing buyer and willing seller" basis, i.e. the estimated market value basis on the lines laid down in *Spencer v. Commonwealth of Australia* (1907) 5 C.L.R. 418, or should it be the "Liquidation Value" or "Nett Asset backing Value" of the shares, as contended by the Official Valuer?

Secondly: If the estimated market value basis is the correct method of valuation, are the allowances made by Mr. Kay in his calculations reasonable or too high, as contended by the Commissioner?

The first of these issues is partly answered by the Official Valuer himself when he expressed the opinion that there was no possible alternative to the "Liquidation Value" basis of valuation. He appeared to concede that, if possible, the market value method should be followed. It is clear to me that the "Liquidation Value" method does not in fact give or attempt to give an estimated market value of shares in a going concern.

In all the English, Australian and New Zealand cases which have been cited to me, where this basis of valuation was used, there have been exceptional circumstances which do not arise in this case. In *Attorney General of Ceylon v. Mackie and Anor.* [1952] 2 All E.R. 775, the date of death and therefore the date of valuation of the testator's shares was 7th September, 1940. Owing to the war and the great disruption of general business conditions there had been violent and unusual fluctuations in the profits and losses of the Company concerned. This made it impossible to make any realistic estimate of a future average maintainable profit. The Privy Council then held that in such exceptional circumstances it was impossible to value the shares other than by reference to the value of the assets.

In the English cases the "Liquidation value" method is only applied when, on the authority of Section 55 of the Finance Act 1940, the deceased's holding of shares gave him control of the Company or put him into one of the exceptional categories laid down by that section. It was only in such exceptional cases that the "Liquidation value" method of valuation can be used in England.

Again, in Australia, it was only by virtue of Section 16A(1) (c) of the Estate Duty Assessment Act 1914-1950 that the Commissioner was given a discretion to use the "Liquidation value" basis to value shares.

As was held by Williams J. in *Federal Commissioner of Taxation v. Sagar* (1946) 71 C.L.R. 421 the "Liquidation value" basis should be used in Australia very rarely where the Company was a "going concern". He then cited the case of where the deceased's shares gave him a controlling interest as the sort of rare instance he had in mind, where the "Liquidation value" of shares should be used instead of their "market value".

In *Abrahams v. Federal Commissioner of Taxation* (1944) 70 C.L.R. 23, Williams J. again declined to apply the "assets value" or "Liquidated value" test. He held that the shares concerned must be valued principally on the basis of the income, or estimated income yield, but added that the assets value could be used as a check and in the exceptional circumstances of that case more reliance than usual could be placed on the assets value. It is clear that the "assets value" assessment was again considered to be one that should only be used on its own in the last resort and under the most exceptional circumstances.

Again in New Zealand, the case of *Commissioner of Stamps v. Haynes and Others* [1924] G.L.R. 271, which was cited to me in support of the Official Valuer's use of the "Liquidation value" basis of valuation in this case, is very much in point. A study of that case, however, makes it clear that the testator in that case held ninety per cent of the shares in the Company concerned and therefore held a controlling interest in it. Another New Zealand case in which the "Asset value" basis was applied is *New Zealand Insurance Co. Ltd v. Commissioner of Inland Revenue* [1956] N.Z.L.R. 501. In this case again the deceased's holding of shares was sufficient to give him a controlling interest in the Company. *In re Crawford (deceased), Public Trustee v. Commissioner of Stamp Duties* [1942] N.Z.L.R. 170, Fair J. held in effect, on the authorities then cited to him, that it was only as a last resort that the value of shares for Death Duty purposes should be ascertained by reference to the value of the Company's assets. These New Zealand cases are in line with both the English and Australian authorities on this issue.

It appears to me to be clear, therefore, that the principle that underlies the decisions of the Courts and the Statute Law in England, Australia and New Zealand is one and the same. Wherever it is possible to do so and there are no exceptional or extraordinary circumstances arising, the value of shares should be arrived at on the "market value" or "the willing buyer, willing seller" principle. It is only when there are some unusual features in the case, e.g. where the deceased shareholder held a controlling interest in the Company, or it is not possible to follow any other basis of valuation, that resort should be made to the "Asset value" basis of valuation.

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When I refer to the facts in the case before me I find that the deceased held only twenty per cent of the issued share capital of G.B. Hari & Co. Ltd. He had no controlling interest at all. It is certainly a private company and also a family company and there have been no actual sales of shares in the Company but these circumstances B are, on their own, by no means unusual. The fact that there are these Founders' Shares, and that the Directors had the power to prevent a transfer of shares of which they did not approve were certainly factors which had to be taken into consideration, but they were not, in my view, factors which made it impossible to employ the "market value" basis of valuing these shares or made it necessary C or even desirable to use the "Liquidation value" as a basis.

The mere fact that it may be difficult, as it is in this case, to arrive at a valuation on the "market value" basis, is, in my view, no reason for not using that method. As was said by Finlay J. in *Inland Revenue Commissioner v. Crossman* [1935] 152 L.T. 98, 101, "enormous difficulties must arise when one has got to apply notionally, the principle of the open market to shares which in fact by reason of D restrictions, could not be sold in the open market."

In my opinion, the method of valuation adopted in this case by Mr. R. S. Kay, the executors' valuer, was the correct basis.

I now come to the second issue. Did Mr. Kay make unduly high allowances in his valuation for such matters as lack of marketability E of these shares, of the restrictions on their transfer and of the amount of profit that should be placed to reserve before dividends could be expected to be paid? I have carefully examined his evidence on these points in the light of the criticisms made by learned Counsel for the Commissioner in these respects. I note that in fact this Company had never paid any dividends since it first began to trade.

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I say at once that I accept the evidence of Mr. Kay. His prognostications may or may not prove to be correct but I accept them as genuinely held and based upon his knowledge of the operations of this Company as its auditor since it was first incorporated in 1956, and his experience as an accountant of standing in Fiji.

Valuation is of course as much, if not more, an art than an exact G science.

On the question of reserves, for example, what may be regarded as making prudent financial provision by one accountant may well be regarded as unnecessarily high provision by another or even as barely enough by a third. I don't think it can be doubted that in November 1961, when the testator died, the estate of business in Fiji, H generally, was at a very low ebb indeed. I do not find it at all improbable that a prudent investor would not have been willing to pay more than par for these £1 Ordinary Shares in this Company at that time. I am fortified in this view by the fact that if it had

been put into liquidation then, the Official Valuer is of the view that very little more than their par value would have been realised. In that valuation I am doubtful if adequate allowance was made for the probability that many of the book debts, which as Mr. Kay pointed out are unusually large, might have proved to be irrecoverable and A
therefore valueless and that the stock would possibly have fetched less than was anticipated, if realised on a forced sale.

After giving the matter careful consideration, I am of the opinion that there are insufficient grounds for me to hold that the valuation made by Mr. Kay was made on any wrong principle and that in so B
far as the particular allowances he made are concerned that they were unreasonable in all the circumstances.

For these reasons I allow the appeal. I accept the evidence and valuation of Mr. Kay and hold that the value of these £1 Ordinary Shares was £1 each and the value of the Founders' Shares was 5/- each at the date of the death of the testator on 15th November, 1961. C

The Plaintiffs are awarded the taxed costs of the appeal.

Appeal allowed.