Privy Council Appeal No. 12 of 1977

Bali Hai Restaurant Limited – – – – – *Appellants*

v.

Ravendra Kumar and Jaffar Ali – – – – – *Respondents*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JUNE 1979

Present at the Hearing:

LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by* LORD KEITH OF KINKEL]

This is an appeal from a judgment and order of the Fiji Court of Appeal dated 26th November 1976. By that order the Court of Appeal by a majority (Gould V.P. and Spring J.A., Marsack J.A. dissenting) dismissed an appeal by the present appellants against a judgment and order dated 19th February 1976 of the Supreme Court of Fiji (Mishra J.) allowing a petition by the present respondents for the winding up of the appellant company on the ground that it was just and equitable to do so. The respondents were not represented at the hearing of the appeal by this Board.

The appellant company was on 13th March 1972 incorporated under the Fiji Companies Ordinance as a private company having as its principal object that of carrying on a restaurant and nightclub business. It was registered with a nominal share capital of $50,000 divided into 50,000 shares of $1 each. Of these 10,000 were issued to the first respondent, Mr. Kumar, 15,000 to the second respondent, Mr. Ali, 15,000 to a Mr. Crawford and 10,000 to a Mr. Qumi, all these shares being duly paid up. There was thus equality of voting power as between the petitioners on the one hand and Mr. Crawford and Mr. Qumi on the other. These four persons, whose occupations were respectively those of bar tender, merchant, theatrical agent and taxi proprietor, were all appointed directors of the company, Mr. Crawford being managing director.

The company started to carry on business on 2nd August 1973. The four shareholders were each employed by it in various capacities and were paid monthly salaries. At the beginning of 1974 the company was in some financial difficulty, and it appears that certain retrenchments were made, including a reduction in the salaries paid to the directors. The directors purported to issue to Mr. Ali 5,000 shares credited as fully

paid in consideration of his forgoing a sum of $2,580·27 due to him as arrears of salary and making a cash payment of $2,419·73. This issue was invalid, by reason of non-compliance with certain provisions of the Articles of Association of the company relating to the issue of new shares.

It was the function of Mr. Kumar to manage the restaurant part of the business. It appears that in May 1974 changes were made there in the interests of economy. Mr. Kumar disapproved of these changes. He voted against them at a meeting of the board, but was out-voted by the other three directors. He thereupon, on 17th May 1974, voluntarily withdrew from active participation in the running of the company's business, and on 14th November 1974 he resigned from his office of director. In July 1974 Mr. Ali also voluntarily withdrew from active participation in the management, and he resigned as a director on 23rd May 1975.

On 29th November 1974 Mr. Kumar and Mr. Ali gave notice requisitioning an extraordinary general meeting to consider resolutions calling for the removal of Mr. Crawford as managing director and the appointment of another shareholder in his place, for the re-arrangement of the company's management, for the completion and audit of the company's accounts, and for the fixing of a date and place for the annual general meeting of the company. It appears that on 3rd December 1974, unknown to the respondents, Mr. Crawford and Mr. Qumi purported to hold a meeting of directors and at this meeting to issue, in consideration of arrears of salary forgone, 4,000 shares in the company credited as fully paid to Mr. Crawford and 3,000 such shares to Mr. Qumi. These issues were invalid for the same reason as the previous similar issue to Mr. Ali. The extraordinary general meeting was held on 17th December 1974. It was attended by the four shareholders, and by two lawyers acting respectively for Mr. Kumar and Mr. Ali and for Mr. Crawford and Mr. Qumi. According to a Minute of the meeting exhibited to an affidavit of Mr. Crawford, Mr. Ali moved the resolution for the latter's removal as managing director, and proposed that he himself be appointed in his place. The lawyer acting for Mr. Crawford and Mr. Qumi said that under the company's Articles the appointment of a managing director was a matter for the directors alone, and that since there were only three directors, the position was a stalemate. The question of a sale of shares was then raised. Mr. Kumar said he would ask $15,000 for his 10,000 shares and Mr. Ali that he would require $30,000 for his 20,000 shares. The two lawyers then retired for a private discussion, and thereafter it was decided that the meeting should be adjourned until 14th January 1975, and that in the meantime the parties could, if so desired, negotiate for the sale of shares through their respective lawyers. No Minute was produced of the adjourned meeting on 14th January. According to Mr. Kumar's evidence, he and Mr. Ali on this occasion first learnt about the purported issue of new shares to Mr. Crawford and Mr. Qumi. There was some discussion about the question of either group selling their shares to the other, but no progress was made. No vote was taken on any of the resolutions before the meeting.

The petition for winding up was presented on 6th June 1975. It was supported by three creditors to whom the company owed a total of about $4,042 and opposed by two others, to whom the company owed a total of about $17,600. The petition was founded upon the grounds contained in section 167(*e*) and (*f*) of the Companies Ordinance, viz., that the company was unable to pay its debts, and that it was just and equitable that the company should be wound up. The first ground was not accepted by the learned trial judge, and it was not relied upon by the petitioners before the Court of Appeal. It is therefore unnecessary to enter upon any consideration of that ground. As regards the second

ground, the petition contained allegations that Mr. Crawford and Mr. Qumi had refused to produce to the petitioners Minutes of meetings or books of account, to hold annual general meetings of the company or to co-operate with the petitioners in finding means to improve the company's business, and further had acted fraudulently in purporting to increase their own shareholdings. It was also alleged that the company had never kept proper books of account available at the registered office, nor caused profit and loss accounts and balance sheets to be prepared and laid before general meetings, had failed to keep a register of members, had failed to file annual returns with the Registrar of Companies, and had never held any general meetings.

The hearing of the petition was opened before Mishra J. on 15th August 1975 for the purpose only of taking the evidence of Mr. Kumar, who was about to leave Fiji permanently for Canada. In the course of cross-examination he said:

> " I want the company wound up mainly because the creditors cannot be paid. My main complaint is that we were not told anything about the company's business. I am going to Canada for good. Not true, that I want to recover my money and take it to Canada ".

The hearing was resumed, after a number of adjournments, on 27th November 1975. Unaudited accounts for 1973 and 1974, prepared by the company's accountants, Messrs. Coopers & Lybrand, had previously been put in by the company. Further unaudited accounts for the first six months of 1975 were produced. No further evidence was led on behalf of any of the parties, it being said by counsel that the parties agreed that the affidavits previously filed in the case should be treated as evidence. These affidavits had little significant evidential value, consisting as they did of an affidavit by the petitioners verifying the petitions in general terms, a further affidavit by them in support of an earlier application for appointment of a provisional liquidator, and an affidavit by Mr. Crawford in opposition to that application.

In the course of his judgment dated 19th February 1976 the learned trial judge noted that the affairs of the company had been conducted in a rather informal and unsatisfactory manner, as regards the holding of general meetings, the filing of returns with the Registrar of Companies, and the keeping of accounts, and observed that these matters should be taken into account in considering the application of the " just and equitable " rule. He expressed the view that the issue of new shares to Mr. Crawford and Mr. Qumi must have been designed to oust the authority of the petitioners as equal shareholders, contrary to what must have been in contemplation when the company was incorporated, and said that the actual legal effect seemed to have been the creation of a complete deadlock in the affairs of the company. He later observed that the company had not yet made a profit and that the dividend prospects were uncertain. Mr. Crawford and Mr. Qumi alone were taking part in the company's management and presumably drawing salaries, whereas the petitioners were deriving no benefit from the business, a situation contrary to what was contemplated when the company was formed. He then referred to an argument by counsel for the company that since the petitioners had themselves resigned their directorships they should not be permitted to complain, and, after quoting a passage from the speech of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A. C. 360 at 379, said this:

> " The Court in this case, therefore, ought to have regard to the circumstances leading to the petitioners' withdrawal from participation in the company's business and their eventual resignation from directorship. It must not overlook the irreconcilable nature of the

differences between the parties which will not permit the business of the company to be conducted smoothly, at least not without causing injustice either to the two petitioners on the one side or Crawford and Qumi on the other, who between them hold equal shares. Both counsel agree that the company's business is an important new venture in a developing country and, if possible, should not be allowed to die. Neither, however, has been able to suggest a practical way out. The company at present is not making any profit. Even if it were making sizeable profits, as was *Yenidje Tobacco Co. Ltd.* ([1916] 2 Ch. 426), the circumstances here, as there, are such as would warrant the making of an order for winding-up ".

In the course of his judgment in the Court of Appeal with which Gould V.P. agreed, Spring J.A. quoted extensively from the speech of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* (*supra*), with particular reference to those aspects of it which stressed that, in the application of the " just and equitable " rule, there is room for recognition that behind or amongst the legal entity of a limited company there are individuals with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. He regarded as important Lord Wilberforce's inclusion among the situations which might attract the operation of just and equitable considerations those where the association of individuals within the company has been formed or continued on the basis of a personal relationship involving mutual confidence, those where there has been an agreement or understanding that all members of the company, other than " sleeping " members, shall participate in the management of it, and those where there is restriction upon the transfer of members' interests in the company, so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. He found it clear from the evidence that in the present case there was a complete lack of confidence between the shareholders, and he took the view that the trial judge had, in the passage which their Lordships have quoted, reached the conclusion that the lack of confidence was justifiable, and he agreed with that conclusion. For this reason, added to the lack of any prospect that the company would in the future be run with equal management participation, he considered that the learned trial judge was correct in making a winding-up order upon the just and equitable ground.

Marsack J.A., in his dissenting judgment, relied upon the circumstance that each of the petitioners had withdrawn from his part in the management of the company's affairs of his own volition, and that no pressure had been put on either of them to resign his directorship. He took the view that there did not exist any situation such as could be described as

> " continued quarrelling and such a state of animosity as preclude all reasonable hope of reconciliation and friendly co-operation ". (*Lindley on Partnership*, 6th edn. p.657).

He regarded the *bona fides* of the petitioners as open to question, and in support of this he referred to Mr. Kumar's evidence that the creditors of the company could not be paid in full but that he and Mr. Ali wanted as the purchase price of their shares 50% more than their par value. He considered this to indicate that they had no intention of settling matters amicably and that their object, after they had withdrawn voluntarily from the activities of the company, was to ensure that Mr. Crawford and Mr. Qumi would not be allowed to carry on with a business which showed some signs of making progress. In so far as a deadlock existed, he regarded this as resulting from the refusal of the petitioners to co-operate at all with the directors who were managing the business, and as not in any way hindering or even detrimentally affecting its management.

He concluded that it would be wrong to allow a recalcitrant attitude on the part of the petitioners to bring about the closure of the business, and that the practical solution, which would be best for the financial interests of all parties, was to allow the business to continue to operate.

Their Lordships find themselves in respectful disagreement with the conclusions of the learned trial judge and of the majority of the Court of Appeal, and in agreement with those of Marsack J.A. They have no criticism to make of the formers' statement of the principles, derived principally from *Ebrahimi v. Westbourne Galleries Ltd.* (*supra*), which they sought to apply. But they do not consider that these principles were correctly applied to the facts and circumstances of this case, the evidence in which appears, in their Lordships' view, to have been misappreciated.

There is no evidence of any disharmony among the four shareholders and directors prior to May 1974. Further, in so far as up to that time there was failure to observe the formalities required by the Companies Ordinance and the Articles of Association of the company, all four must bear equal responsibility for it. In May 1974 there was a difference of opinion between Mr. Kumar on the one hand and the other three directors, on the other hand, as to the policy to be pursued as regards the restaurant side of the business. The view of the other three prevailed.

There is no evidence to indicate that the decision taken was not arrived at *bona fide* and in the best interests of the company's business. Mr. Kumar then withdrew from any active part in the management, and there is again no evidence that this was due to pressure of any kind, direct or indirect, applied by any of his co-directors. The withdrawal must therefore be taken to have been entirely voluntary. The same applies to his resignation from the office of director on 14th November 1974. Likewise, when Mr. Ali withdrew from active participation in the management in July 1974, there is no evidence that this arose from any sort of pressure from Mr. Crawford and Mr. Qumi, nor that there was any unreasonable conduct on their part which made his continued participation intolerable. There is not even any evidence of disagreements with them. Mr. Ali gave no evidence. His action is quite consistent with his having lost interest in the business possibly because he was disappointed that it had not achieved the degree of success for which he had hoped. On 29th November 1974 Mr. Kumar and Mr. Ali served their notice requisitioning the extraordinary general meeting. Up to that time there is no reason to suppose that Mr. Crawford and Mr. Qumi were not genuinely doing their best to make a success of the business. For what they are worth, the accounts for 1974 which were produced indicate that, if allowance for depreciation be left out of account, a certain amount of profit was beginning to be made, and the enterprise was still young. This point was noted by Marsack J.A. On 3rd December 1974 Mr. Crawford and Mr. Qumi made the purported issue of new shares in their own favour. The petitioners sought to attribute a sinister implication to this, and there can be no doubt that it was improper. At the same time it is to be kept in view that all four directors were party to a similar exercise in favour of Mr. Ali at the beginning of 1974. Mr. Crawford and Mr. Qumi may be presumed to have believed that issue to have been valid, and, if it had been, the petitioners would have a preponderance of voting power at the extraordinary general meeting. The apprehension of that situation may go some distance to explain, though it does not excuse, the issue purported to be made by Mr. Crawford and Mr. Qumi in their own favour. In the result, of course, it had no legal effect. In their Lordships' view it is of little significance in all the circumstances as a basis for the petitioners' claim to have had a justifiable lack of confidence in the probity of the company's administration. Though naturally seized upon by the petitioners for that purpose, it cannot, upon

the evidence as a whole, be regarded as having entered appreciably into their motivation for seeking the winding up of the company. At the extraordinary general meeting convened on 17th December 1974 and resumed on 14th January 1975 the main topic for discussion appears to have been the question of the purchase by Mr. Crawford and Mr. Qumi of the petitioners' shares. The price sought by the petitioners was upon any view quite unreasonably high, and their Lordships share the doubts which in the view of Marsack J.A. were thereby cast upon the petitioners' *bona fides*.

In the result, therefore, their Lordships are of opinion that the petitioners have entirely failed to prove either that any lack of confidence which they may have felt in the management of the company by Mr. Crawford and Mr. Qumi was justifiable, or that there were any differences, let alone irreconcilable differences, as to the way in which the business should be carried on. The only differences which appear to have existed were that Mr. Crawford and Mr. Qumi on the one hand wished to carry on the business, despite certain initial difficulties, and bring it to a state of prosperity, while the petitioners on the other hand wished to have nothing more to do with it and if possible to bring it to an end. These are not the sort of differences which can justify the winding up of a company under the "just and equitable" rule. There is no question of the petitioners having been expelled from the management of the company. They withdrew voluntarily, and the evidence falls far short of establishing that they did so because Mr. Crawford and Mr. Qumi had made their position intolerable. In the circumstances the *ratio* of such cases as *Ebrahimi v. Westbourne Galleries Ltd.* (*supra*) and *In re Yenidje Tobacco Co. Ltd.* (*supra*) has no application. Consideration of what is just and equitable involves that the position of both sides to the dispute should be looked at. While at first sight it may seem unfair that the petitioners should be locked into a company from which for the time being at least they were deriving no benefit, it is necessary to take into account the reasons which led to that situation. The petitioners, upon whom rests the burden of making out a case for the extreme step of winding up, have not established that the responsibility for the situation lies with anyone but themselves. Mr. Crawford and Mr. Qumi have not oppressed the petitioners by any exercise of legal powers. It would be unfair to them, who for aught seen are doing their best to make a success of the business, to have it torn down with the probability of considerable financial loss to them and also to the petitioners. Their Lordships have not overlooked the formal irregularities complained of by the petitioners, which undoubtedly existed. But the evidence of Mr. Kumar falls short of what is necessary to show that he was seriously concerned about those of such irregularities for which he had no personal responsibility. His evidence on the matter was vague and unspecific and unvouched by any correspondence passing before the time when the dispute came to a head. Mr. Ali gave no evidence about the matter and no application was made for leave to cross-examine Mr. Crawford and Mr. Qumi. In the circumstances it cannot be held that the petitioners took all reasonable steps within the forum of the company to have such irregularities rectified.

For these reasons their Lordships are of opinion that the judgment and order of the Court of Appeal should be reversed and the petition for winding up dismissed. The appellants will have their costs against the respondents before this Board and in the courts below. Their Lordships will humbly advise Her Majesty accordingly.

311587—2 Dd 119941 70 7/79

In the Privy Council

BALI HAI RESTAURANT LIMITED

v.

RAVENDRA KUMAR and
JAFFAR ALI

DELIVERED BY
LORD KEITH OF KINKEL

Printed by HER MAJESTY'S STATIONERY OFFICE
1979