PC
~~CMH G 2~~
Judgment - 53/1964

No. 14 of 1963

IN THE PRIVY COUNCIL

O N   A P P E A L
FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE MATTER OF KUALA LUMPUR HIGH COURT COMPANIES (WINDING-UP) No. 2 of 1961

AND IN THE MATTER OF SEMANTAN ESTATE (1952) LIMITED

AND IN THE MATTER OF THE COMPANIES ORDINANCES 1940 to 1946

10

B E T W E E N:

NG ENG HIAM (Petitioner) Appellant

- and -

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.
78708

1. NG KEE WEI
2. NG CHIN SIU
3. NG BEH LEOW
4. NG SOOK CHIN (f)
5. NG SOOK HIN (f)
6. NG SOOK KENG (f)
7. NG BEH YEOW
8. NG BEH PUAN
9. NG BEH KIAN
10. LIM TUAN (f)
11. NG BEH TONG

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(Opponents) Respondents

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the Order of the Court of Appeal of the Supreme Court of the Federation of Malaya dated the 3rd December 1962 dismissing the Appeal of the Appellant against the Order of Ong J. made in the High Court at Kuala Lumpur on the 14th December 1961 dismissing the Petition of the Appellant for the winding up by the Court under the provisions of the Companies Ordinances, 1940 to 1946 of the above mentioned Company Semantan Estate (1952) Limited (hereinafter referred to as "the Company").

P.79
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Pp.31-2
P. 1

2. The issue in the present Appeal is whether in the light of the evidence adduced before Ong J. it was just and equitable that the Company should be wound up by the Court under the provisions of section 166 of the Companies Ordinance, 1940 (S.S. 49 of 1940) of the former Colony of the Straits Settlements as applied in the Federation by the Companies Ordinance, 1946 (M.U. 13 of 1946).

3. The provisions of the Companies Ordinance, 1940 which are material to this Appeal are set out in the Annexe hereto. 10

P. 1
P.10
Pp.81, 89
P. 125

4. The Appellant presented his said Petition to the High Court at Kuala Lumpur and filed his affidavit verifying the same on the 23rd October 1961 to which was exhibited a copy of the Company's Memorandum and Articles of Association (Exhibit "B") and a copy of the Minutes of the General Meeting of the Company held on the 27th May 1961 (Exhibit "C"). The facts set out in paragraphs 1 to 5 inclusive and in paragraphs 7 to 13 inclusive of the Petition were not disputed and they are summarised in paragraphs 5 to 8 hereof. 20

5. The Company was incorporated in May 1952 as a private company limited by shares with its registered office at No. 19 Ampang Road, Kuala Lumpur. The capital of the Company was $1,000,000 divided into 1,000 shares of $1,000 each all of which were issued for cash in July 1952 and had since stood credited as fully paid in the books of the Company as to 50% thereof in the names of the Appellant a Permanent Director, and members of his family, and as to the remaining 50% thereof in the names of the Second Respondent, the only other Permanent Director and members of his family. 30

6. The objects of the Company were inter alia to carry on business as rubber planters and estate owners and at the date of the Petition it was the owner of three rubber estates namely the Semantan Estate in Mentakab, Pahang the Batu Estate, Kuala Lumpur and the Segambut Estate, Kuala Lumpur but part of the Batu Estate had been acquired by the Government. 40

P. 89

7. The Appellant and the Second Respondent were the promoters of the Company and the Articles of Association thereof contained detailed provisions ensuring them an equal share in the management of the business and their respective families equal

voting strength. Such provisions are briefly as follows:-

(a) Under Article 82 the Appellant and the Second Respondent were appointed Permanent Directors for life or until resignation subject to their holding a special qualification (which they held at all material times) of ordinary shares of the nominal value of $20,000 at least with power to appoint a successor.

10 (b) By the combined effect of Articles 83 and 99 the management of the Company is vested in the Permanent Directors or in the sole Permanent Director, as the case may be, who are or is authorised to exercise all the powers of and do all such acts as may be exercised or done by the Company, except such as are expressly by the Articles or by law required to be done by the Company at a general meeting and all other Directors if any
20 are made subject to their or his control and bound to conform to their or his directions. Pp.110,111 Pp.114,115

(c) Under Article 86 the power of the Company in general meeting to appoint or remove directors is expressly excluded so long as any Permanent Director holds office and by Article 84 the power of appointing and removing directors and of defining their powers and fixing their remuneration is given to the Permanent Directors or Permanent Director. P.111 P.109

30 (d) Under Article 107 the quorum for a directors' meeting is fixed at two (unless otherwise determined, which has not been done) and it is further provided that the Chairman shall not have a second or casting vote in case the directors shall be equally divided on any question. P.117

(e) Under Articles 67, 69, 72 and 77 it is provided that at general meetings, on a show of hands, each shareholder personally present
40 shall have one vote, and on a poll, each shareholder present either in person or by proxy shall have one vote for each share held by him, and that the Chairman shall not have a second or casting vote. Pp.106,107

(f) Under Articles 36, 38 and 39 the right to transfer shares is restricted to the extent that, Pp. 99,100

except for certain cases of transfers to relatives, no shares can be transferred (even as between members) without the unanimous approval of all the Directors.

8. The Appellant and the Second Respondent are the sole directors of the Company having been appointed the Permanent Directors thereof under Article 82 as aforesaid. At the first Board Meeting held on the 22nd May 1952 the Second Respondent was appointed Chairman of the Board and his eldest son the First Respondent who was a shareholder was appointed General Manager of the Company. Pursuant to a resolution of the Board all cheques drawn on the Company's Banking account are required to be signed by one of the Permanent Directors and countersigned by the General Manager or the Secretary of the Company. 10

9. The case alleged by the Petitioner verified as aforesaid and further supported by a supplemental affidavit filed on or about the 25th November 1961 was as follows. 20

Pp. 5, 6

10. Until the latter part of 1957 the practice in the running of the Company had been for each of the Permanent Directors to be supplied more or less regularly with detailed estimates of expenditure and monthly statements of accounts with detailed analyses thereof prepared by the estate managers. Sales of rubber had been effected by the Second Respondent with the knowledge of the Appellant and whenever necessary there were informal business discussions between them. Regular formal Board meetings were held at which estimates and monthly estate accounts were discussed and passed, the Secretaries reported on the financial position of the Company and the Board dealt with progress reports by the General Manager and all other matters requiring its attention. 30

P. 6

11. During the year 1957 differences arose between the Appellant and the Second Respondent regarding the conduct of the Company's business. The Appellant specified two particular instances and Ong J. expressly found that these two matters were the root cause of all the ensuing friction. The first occurred on the 24th May 1957 at a Board Meeting when the First Respondent, who was in attendance, claimed a special bonus for his work in connection with the acquisition proceedings relating to part of the Batu estate and the Appellant opposed the claim. The second was in or about September 1957 when, without 40

the knowledge or consent of the Appellant, the First and Second Respondents authorised a contractor to fell jungle trees on the Semantan estate on terms very much less favourable than those agreed by another contractor whom the Appellant had introduced to the Company.

12. It is fair to say that in his affidavit in answer to the Petition the First Respondent put forward an explanation that there had been a drop in the price of timber that the new contractor undertook to construct a road for estate use and that the original one had failed to sign a contract and stopped payment of his cheque given as a deposit, but prior to this late stage the Appellant had not been able to ascertain the circumstances in which the new contract was made or even its precise terms nor was he consulted at all as to the steps which should be taken in the circumstances which had thus arisen concerning the first contractor. Pp. 13-19

13. As a result of the differences and disputes the Appellant and the Second Respondent and their respective families had not been on speaking terms since the beginning of 1958 and the following consequences had ensued:- P. 7

(a) Contrary to the previous practice the Appellant had only belatedly and irregularly been supplied with monthly accounts and annual estimates and since March 1959 they had not been supplied to him at all in spite of repeated requests made by him for such estimates and accounts.

(b) The Appellant had in reality been deprived of his right of access to the books of account and other Company records because to the best of his knowledge and belief the same had been removed from the registered office of the Company at No. 19, Ampang Road, Kuala Lumpur to a room in No. 21, Ampang Road which was also used as a private office by the Second Respondent. By reason of the strained relationship that had existed between the Appellant and the Second Respondent since 1957 it had not been possible for the Appellant to visit the said premises and inspect the books of account and other documents.

(c) Save as to certain matters connected with the acquisition proceedings relating to part of

the Batu estate in respect of which concurrence of the two Permanent Directors was obtained through the Secretaries of the Company and save as to two directors meetings called for the 17th June 1958 and the 12th November 1958 at which, by reason of differences no business could be conducted, and a third meeting held on the 27th November 1958 at which the strike situation on the Company's rubber estate was directed to be referred to the Company's legal advisers, there had not been any meeting of the directors, either formal or informal to transact any of the Company's business since the beginning of 1958. The business of the Company had been and was being conducted by the Second Respondent without the concurrence of the Appellant and contrary to law and the Articles of Association since the Second Respondent had no authority to act alone on behalf of the Board of Directors.

(d) No annual general meetings of the Company were held during the years 1958, 1959 and 1960.

(e) A general meeting convened by the Secretaries without the Appellant's authority was held on the 27th May 1961 before which was laid what purported to be the directors' report and the balance sheets and profit and loss accounts for the years 1957, 1958 and 1959. The Appellant had not signed any of these documents and had declined to accept responsibility therefor because he had not had the opportunity of scrutinising the accounts or taking any part in the conduct of the business during the relevant years. At the said meeting the Appellant proposed that the consideration of the said purported report of the directors and the accounts be adjourned to enable him to inspect the accounts. Two amendments to the resolution having been moved the Appellant demanded a poll which the Second Respondent, as Chairman of the said meeting, wrongfully disallowed.

P. 16

14. During the years 1958 and 1959 the Appellant attempted on four occasions through various intermediaries to obtain the approval of the Second Respondent to the removal of the deadlock which had arisen by the division of the Company's estates between the Appellant and the Second Respondent by

drawing lots with adjustment by cash payment if necessary to ensure equality or alternatively by a voluntary winding up of the Company. Neither of these proposals was accepted. Pp. 23, 24

15. The Appellant's Petition was supported by all the members of his family who were contributories of the Company and who, together with the Appellant, held 50% of the shares of the Company. The Petition was opposed by the Second Respondent and all the members of his family who were contributories of the Company other than Ng Beh Yoke who died in 1958 and had held 10 $1,000 shares in the Company.

16. The sole evidence in opposition to the Petition was the Affidavit of the First Respondent sworn on the 24th November 1961 in which he alleged that the Company continued to be successful claimed that there was no reason whatsoever why it should be wound up and contended that the petitioner had adopted an obstructive and non-co-operative attitude and that his attendances at the registered office had become rare occurrences because of ill-feeling between him and the Second Respondent which the deponent attributed solely to the refusal of the Second Respondent to agree to a voluntary liquidation. P. 11

17. In this affidavit it was conceded that as a consequence of such ill-feeling it had become necessary to hold directors meetings by means of circulars.

18. The deponent further stated that audited balance sheets had been sent to the Appellant and that the accounts were and always had been available at the Company's office for his inspection and that no obstacle of any kind existed which could prevent the Appellant from making any investigation which he might see fit.

19. The First Respondent further said that when the Appellant opposed the special bonus proposal in 1957 to remove any misunderstanding no award had been made. He also explained the circumstances under which the contract for the felling of jungle trees had been awarded to a contractor other than the Appellant's nominee and contended that full information regarding this matter was and had always been available at the Company's office. He further contended that some members of the two families were on friendly terms with each other. P. 13 l.5

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20. The First Respondent by his said affidavit specifically traversed the detailed allegations made in the Petition and summarised in paragraph 13 hereof and said inter alia that the failure to hold annual general meetings in 1958, 1959 and 1960 was due solely to the doubts of the Secretaries as to their power to convene such meetings without the authority of the Appellant and that he had only himself to blame if he neglected to visit the Company's office and see what was going on. 10

21. It was sought to justify the refusal of the Appellant's demand for a poll at the meeting of the 27th May 1961 on the ground, which it is respectfully submitted is wrong, that it was merely in respect of his resolution for an adjournment of the meeting.

22. In paragraph 12 of his said affidavit the First Respondent whilst claiming that it was due to the obstructive attitude of the Appellant nevertheless conceded that it had become necessary to conduct a lot of the Company's business without his express concurrence. 20

P. 15 l.15 — 23. By his said affidavit the First Respondent contended (wrongfully as it is respectfully submitted) that no deadlock existed and that it had not become impossible to conduct the business of the Company according to law and the regulations of the Company.

P. 19 — 24. The Appellant in a further affidavit in reply filed on or about the 5th December 1961 - 30

P. 21 l.13 — (a) Whilst admitting that the audited balance sheets were sent to him denied that the full accounts and estimates were made available for his inspection and examination at the Company's registered office as on the several occasions when he called there to inspect the same he found that they were not available and had been taken without his knowledge or consent to No. 21 Ampang Road;

P. 20 l.10 — (b) Denied that he had been obstructive or uncooperative at all in the affairs of the Company; 40

(c) Contended that the rupture of friendly relations between the Appellant and the Second Respondent was personal to both of them and was the result of the absence of trust and congeniality between them;

(d) Pointed out that no reply had been received from the Second Respondent to the Appellant's written inquiry on the 12th April, 1958 (Exhibit "NEH1") for information concerning the jungle tree felling contract and that although by a letter dated the 29th April 1958 (Exhibit "NEH2") the Secretaries of the Company had replied to the said inquiry to the effect that they believed the First Respondent should be asked to give an explanation to the Board of Directors and the matter had been on the Board's agenda for more than one meeting yet owing to the strained relations between the Appellant and the Second Respondent these meetings terminated before it could be discussed; and

P.20 1.31
P.133
P.136

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(e) Affirmed that the differences of opinion existing between the Appellant and the Second Respondent made it impossible for the business of the Company to be conducted with their concurrence in consequence of which the First and Second Respondents were conducting the Company's business without reference to the Appellant and contrary to the provisions of the Companies Ordinance and the Company's Articles.

P.22 1.23

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25. The Appellant's Petition was heard by Ong J. in the High Court at Kuala Lumpur on the 14th December 1961 and on the same day the learned Judge ordered it to be dismissed. There was no cross examination of either deponent.

P. 26
P. 31

26. The Appellant duly gave Notice of Appeal dated the 15th December 1961 against the whole of the said decision of Ong J. who accordingly delivered his Grounds of Judgment dated the 14th February 1962

P. 32
P. 34

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27. After referring in detail to the Petition and the evidence filed on both sides and observing that the event of one family defecting to the other (which alone could prevent parity of voting) had not yet occurred in the history of the Company and that on the Petition the members of each family aligned themselves according to their respective loyalties Ong J. gave the following reasons for his decision:-

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> "In dismissing the petition at the conclusion of the hearing, I had been, and still am, clearly of the opinion that the two matters which arose in 1957 were the root cause of all the ensuing friction. I felt no doubt that Ng Kee Wei's claim to a special bonus had been made

P.39 1.2

with his father's blessing, and that, when the petitioner felt constrained to voice his opposition, the former congeniality which had subsisted between the two business magnates evaporated under the heat of nothing more calorific than injury to personal self-esteem. Had Ng Chin Siu, or his son, informally broached the subject earlier to the petitioner, over a friendly cup of tea, neither party would have had to take up a position from which any resilement involved an inevitable "loss of face". The proposal, unfortunately, had been made at a Board Meeting, and this difference of opinion had sufficed to cause a rift in the lute. Four months later, the rift was widened by the matter of the choice of a contractor. I shall pass over these two matters by only saying, very briefly, that Ng Chin Siu and Ng Kee Wei had both tacitly acknowledged their want of tact over the matter of the special bonus by dropping the claim, and that, in regard to the jungle felling contract, had the petitioner condescended to make any genuine attempt to find out whether or not the fancied insult was intended, he could readily have satisfied himself that his allegations of "considerable loss" suffered by the company were exaggerated.

After careful consideration of the affidavits on both sides, I find that all the subsequent complaints by the petitioner flowed from nothing more substantial than pique which he felt over the events of 1957. There were no grounds which could justify what was tantamount to an ultimatum, vide the last paragraph in the letter of April 12, 1958, exhibited to the petitioner's affidavit of December 5, 1961 and marked "NEH-1". The reply by the Secretaries, "NEH-2", clarifies the position as seen by a neutral party. Certainly, there were no grounds for "absence of trust". Absence of congeniality could have been, and still can be, overcome. The Petitioner had been more unreasonable than co-operative, and any deadlock so-called was one created entirely by himself. I could not, and still cannot believe, that businessmen of the calibre and standing of the petitioner and Ng Chin Siu cannot, if they have to, be large-hearted enough to treat a mutual misunderstanding as if there had never been one";

and then after observing that he has perused the authorities cited to him including In re Yenidje Tobacco Company Ltd. (1916) 2 Ch 428 the learned Judge declared as follows:-

P.40 1.12

> "... wounded pride on the part of the petitioner over fancied slights could not make it "just and equitable" that I should make the order which was sought. The interests of the shareholders must be considered, and I am not at all satisfied that it would be just and equitable to wind up the company in so far as they are concerned; rather the contrary. Even regarding this private company as a partnership I had in mind as particularly appropriate what was said in Lindley on Partnership (11th Ed.) at p. 692:
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> > "It must be borne in mind that the Court will never permit a partner by .... rendering it impossible for his partners to act in harmony with him, to obtain a dissolution on the ground of the impossibility so created by himself."
>
> I felt, as I still do, that the company could carry on with advantage and profit to all its shareholders, and for that reason I had dismissed the petition with costs."

28. It is respectfully submitted that the learned Judge failed to give any or sufficient weight to the deliberately planned constitution of the Company, the irreconcilable nature of the differences between the two Permanent Directors, the fact that the families stood by their respective heads and thus maintained parity of voting rights and that in the circumstances the Company could only be and was being carried on by overriding the Petitioner which by his said affidavit the First Respondent expressly claimed the right to do and by irregularities more particularly referred to hereafter and that the learned Judge further erred in denying relief to the Petitioner on the ground that he was to blame in view of the express finding that the root cause of all the friction was the two matters which arose in 1957 and that in that regard the First and Second Respondents had tacitly acknowledged their want of tact.

29. The Appellant duly appealed to the Court of Appeal against the whole of the said judgment of Ong J. on the grounds set out in a Memorandum of Appeal

P. 41

dated 21st March 1962 which grounds are in effect summarised in the last previous paragraph.

P. 44 — 30. The said appeal was heard by the Court of Appeal (Thomson C.J. Hill J.A. and Syed Sheh Barakbah J.A.) at Kuala Lumpur on the 15th and 16th October 1962.

P. 79 — 31. On the 3rd December 1962 the Court of Appeal unanimously dismissed the Appellant's appeal.

P. 65 — 32. Thomson C.J. after referring at the beginning of his judgment to section 166(6) of the Companies Ordinance, 1940 and to the principles enunciated in <u>In re Yenidje Tobacco Company Limited</u> (1916) 2 Ch 426 and <u>Lock v John Blackwood Limited</u> (1924) AC 783 considered the Articles of the Company and observed that - 10

P. 66 1.17

> "...not only has control of the Company been equally divided between the two families, so to speak, but the detailed provisions as regards the management of the Company are such as to make the resolution of any difference between the two Permanent Directors a matter of virtual impossibility..... In other words, there is no provision for a domestic forum in which differences can be determined without the necessity for an application to the Court "from which it is respectfully submitted it followed on the facts that there was a clear case of deadlock but instead of so holding the learned Chief Justice went on to say that the corollary of this situation was that both the Permanent Directors had undertaken to display more than usual forbearance and tolerance of each other's point of view in relation to the Company's affairs and he thought one must approach the facts in the light of these considerations and continued as follows:- 20 30

P. 66 1.31

P. 67 1.14 — 33. "... if the Appellant allowed the two incidents of which we have heard so much to lead him to a state of mind when he thought, no doubt in perfect good faith, that co-operation between himself and his fellow Permanent Director was impossible then he was failing in the obliga-tion to exercise tolerance and forbearance which he had undertaken. 40

It is not necessary to consider whether there have been minor technical breaches of the

Company Law. What is remarkable is that there is no suggestion that the Company is not making money; there is no suggestion that it would make more money if the Permanent Directors were on speaking terms; there is no question of what has been called its sub-stratum being gone; there is no suggestion that its business cannot be or is not being carried on and indeed efficiently carried on; there is no suggestion of the
10 slightest lack of probity or of either side seeking to obtain an unfair advantage over the other or make an unfair profit or anything of the sort."

34. Thomson C.J. concluded his judgment by observing that under the circumstances he did not see any reason why it should be regarded as "just and equitable" that the Appellant should have his way and have the Company wound up. He could see no reason for interfering with the decision of Ong J. which he considered to
20 be based upon a sound induction of all the facts of the case. — P. 67 1.39

35. Hill J.A. after giving a brief outline of the previous history of the case and summarising the arguments of both sides in the Court of Appeal then considered the Appellant's complaints which formed the grounds for his Petition and the replies thereto. — P. 68; P. 73 1.4

36. The learned Judge of Appeal attached little importance to the First Respondent's application for a bonus which had been dropped so that no cause for
30 dissension remained. With regard to the Appellant's allegations in connection with the timber felling contract the learned Judge of Appeal considered that the explanation given in the First Respondent's affidavit appeared reasonable and should, on the face of it, have satisfied the Appellant. — P. 73 1.7; Pp. 73-4

37. Hill J.A. next referred to the letters dated the 12th April 1958 (Exhibit "NEH-1") and the 30th December 1958 (Exhibit "NEH-4") respectively which the Appellant had written and after observing that he had
40 hardly been co-operative when in the later letter he queried whether there was sufficient time for giving notice for the proposed General Meeting, continued as follows:- — P. 74 1.12

"The events which the Petitioner claimed then to be leading to a deadlock would appear to have been certainly due in part to a lack of — P. 74 1.38

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congeniality but I can find no justification for a lack of trust. Congeniality is probably essential between partners who, say, are solicitors, but as between directors of a rubber estate it seems no more than desirable."

P. 75 l.4

38. Hill J.A. regarded the further matters relied upon by the Appellant as being inconsequential when regarded singly and when considered together as having been reasonably explained by the Respondent.

39. The learned Judge of Appeal then observed that:- 10

P. 75 l.37

"From these "differences" Mr. Ramani contended that three irregularities resulted in the functioning of the Company contrary to Articles 85, 86 and 107 of the Articles of Association and, with regard to the removal of the books, to section 122 of the Companies Ordinance"

and said

"When I compare the differences between Ng Eng Hiam and Ng Chin Siu with those that led the Courts in the cases I have referred to to hold 20 that there was such a deadlock that made a winding up order just and equitable, the inadequacy of the grounds on which the Petitioner seeks the dissolution of this prosperous family concern, becomes very apparent. A dissolution, moreover, that is against the wish of the surviving Respondents and there is, further, no evidence that it receives the whole-hearted support of all members of the Petitioner's family."

There was certainly no evidence to the contrary 30

P. 76 l.7

40. The learned Judge of Appeal brushed aside the irregularity in regard to section 122 of the Ordinance as being so technical that it should be ignored and took the view that the question of irregularities against the Articles did not require the Court's consideration at that stage because they appeared to him to be outside the scope of the real issue which was whether there was a deadlock due to

P. 76 l.16

the differences between the two directors. He referred specially in this connection to the question of the 40 Appellant's request for a poll which had arisen at the Annual Meeting held on the 27th May 1961.

41. It is respectfully submitted that here the learned Judge of Appeal fell into fundamental error since it was a most pertinent consideration that having regard

to the constitution of the Company the First and Second Respondents and their supporters could only continue the Company and force their will on the Appellant by committing irregularities which they were proceeding to do and of which their conduct with regard to the poll at the meeting of 27th May 1961 is a most significant example.

42. In the judgment of Hill J.A. the differences between the Appellant and the Second Respondent paled into insignificance compared with those which had arisen in the Yenidje Tobacco Company case and if the principles governing partnerships were to be applied in accordance with the decision of the Ontario Court of Appeal in Re Bondi Better Bananas Ltd. (1952) 1 DLR 277 he did not consider that a stage of such continual quarrelling and animosity had yet been reached between the Appellant and the Second Respondent as to justify a winding up. In his view there seemed to be reasonable hope of reconciliation and co-operation if ordinary good sense were employed. Accordingly in his judgment Ong J. properly exercised his discretion in refusing to make an order for the winding up of the Company. It is respectfully submitted that the evidence disclosed no ground for any such hope.

P. 76 l.22

43. Barakbah J.A. concurred with the judgments of Thomson C.J. and Hill J.A. He entertained no doubt on the evidence that there had been some quarrelling and dissatisfaction between the Appellant and the Second Respondent but in his opinion it had not been as serious as the Appellant had made out. Moreover the differences between the two directors were not in his view such as would cause complete deadlock rendering it impossible to carry on the business any longer. The Company was a family concern and he felt that resolution of the differences would not be impossible. In all the circumstances it would not be in the interest of the several shareholders to have the Company, which was in a flourishing condition, wound up. He accordingly concurred with Thomson C.J. and Hill J.A. in dismissing the Appellant's appeal. Here again the learned Judge of Appeal failed to give any or any proper weight to the complete estrangement between the two Permanent Directors or to the fact that this must inevitably produce deadlock unless it be avoided by irregularities on the part of the Second Respondent's family which

P. 77

P. 78 l.22

had improperly taken and retained control of the Company.

44. The evidence established or it is properly and necessarily to be inferred from the facts proved that the following among other irregularities have been are being committed by the Respondents:-

(i) The books of the Company were removed from the registered office to No. 21 Ampang Road and kept there contrary to section 122 of the Companies Ordinance. 10

(ii) The Second Respondent is performing the functions of the Board of Directors on his own without the concurrence of the Appellant and without even consulting him contrary to Articles 82, 83 and 99 of the Company's Articles of Association.

(iii) The business of the Company is being managed by the First and Second Respondents instead of by the Directors contrary to the said Article 99.

(iv) Cheques have to be drawn but there are no proper resolutions by the directors to authorise or confirm these. 20

P. 8 l.23
P.14 l.39

(v) No Annual General Meetings were held in the years 1958, 1959 and 1960 contrary to section 124 of the Companies Ordinance and Article 52 of the Company's Articles of Association.

(vi) The General Meeting held on the 27th May 1961 was convened without the authority of the Appellant and contrary to the said Article 52.

P. 128

(vii) As appears from the Minutes (Exhibit "C") no Profit and Loss Account or Balance Sheet was issued for the years 1957, 1958 and 1959 contrary to section 124 of the Companies Ordinance. 30

P. 8 l.29

(viii) A report purporting to be the directors' report required by section 124 of the Companies Ordinance was laid before such meeting although the same had not been approved by the Appellant.

(ix) At such meeting the Second Respondent wrongfully and in breach of Article 67 of the Company's Articles of Association refused the Appellant's 40

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demand for a poll. P. 22 l.17

45. On the 15th April 1963 the Appellant was by Order of the Court of Appeal granted final leave to appeal to His Majesty the Yang di-Pertuan Agong from the said judgment of the Court of Appeal and the said Appeal to His Majesty the Yang di-Pertuan Agong is accordingly referred to the Judicial Committee of Her Majesty's Privy Council for hearing pursuant to Article 131 of the Federal Constitution and Article 2 of the Federation of Malaya (Appeals to Privy Council) Order in Council, 1958 (S.I. 1958 No. 426). P. 80

46. On behalf of the Appellant it will be contended that the decision of the Court of Appeal is wrong and that this Appeal should be allowed for the following among other

REASONS

(1) The Judgments failed to give any or sufficient weight to the fact that the constitution of the Company provided and was intended so to do that the Company can only be lawfully managed so long as the Appellant and the Second Respondent and those members of their respective families who are members of the Company are in amity and agreement.

(2) In fact as was clearly established they were irreconcileably or seriously estranged and there was therefore a deadlock which of itself made it just and equitable that the Company should be wound up.

(3) In any event the Company was being carried on by the First and Second Respondents against the wish and to the exclusion of the Appellant and the members of the Company supporting him and by means of breaches of the Company's Ordinance and the Company's Articles of Association and in the circumstances could not be carried on without such breaches.

(4) Such conduct on the part of the Respondents and such breaches made it just and equitable that the Company should be wound up but the learned Judges treated such considerations as irrelevant or failed to give them any or any proper weight.

(5) The Appellant and the members of his family supporting him were by demanding a poll entitled to prevent the Respondents from passing any resolution in general meeting and the Appellant having duly made such demand at the meeting of the 27th May 1961, they were wrongfully deprived of their rights by the refusal of such poll by the Second Respondent but this was likewise treated as irrelevant or not given any or any proper weight. 10

(6) In deciding that it was in the interest of the shareholders for the petition to be dismissed the learned Judges overlooked the fact that, if the Appellant and his supporters were not prevented by irregular acts on the part of the Second Respondent and his supporters from exercising their rights under the Articles, the due management of the Company would be impossible because of the deadlock which could only be resolved by winding up the Company. 20

(7) The question whether the Appellant or the First and Second Respondents were to blame for the estrangement or their relative degrees of blame were not relevant considerations or if they were the learned Judges wrongly appraised the respective blameworthiness in that the root cause of such estrangement was and was expressly found to be the fault of the First and Second Respondents in their conduct in 1957 with regard to the special bonus and the Jungle Timber Contract. 30

(8) On the evidence and the findings of fact, it is just and equitable that the Company should be wound up.

(9) The decision appealed from is wrong and ought to be reversed.

REGINALD W. GOFF

P. G. CLOUGH.

A N N E X E

THE COMPANIES ORDINANCE, 1940 (S.S. 49 of 1940)

(Applied in the Federation by the Companies Ordinance, 1946 (M.U. 13 of 1946))

PART V

MANAGEMENT AND ADMINISTRATION

Meetings and Proceedings

Annual general meeting.

113. (1) A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting of the company in accordance with the provisions of this section, the company, and every director or manager of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand dollars.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call, or direct the calling of, a general meeting of the company.

Inspection of minute books.

122. (1) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of this Ordinance shall be kept at the registered office of the Company, and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(2) Any member shall be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any such minutes as aforesaid at a charge not exceeding twenty-five cents for every hundred words.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper time, the company and every officer of the company who

is in default shall be liable in respect of each offence to a fine not exceeding forty dollars and further to a default fine of forty dollars.

(4) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.

Accounts and Audit

Keeping of books of account.

123. (1) Every company shall cause to be kept proper books of account in the English language with respect to - 10

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) all sales and purchases of goods by the company;

(c) the assets and liabilities of the company. 20

(2) The books of account shall be kept at the registered office of the company or at such other place within the Federation as the directors think fit, and shall at all times be open to inspection by the directors.

(3) If any person being a director of a company fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he 30 shall, in respect of each offence, be liable on conviction to imprisonment of either description for a term not exceeding six months or to a fine not exceeding four thousand dollars:

Provided that a person shall not be sentenced to imprisonment for an offence under this section unless, in the opinion of the court dealing with the case, the offence was committed wilfully.

Profit and loss account and balance sheet.

124. (1) The directors of every company shall at some date not later than eighteen months after the 40 incorporation of the company and subsequently once at least in every calendar year lay before the

company in general meeting a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account for the period, in the case of the first account, since the incorporation of the company, and, in any other case, since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months, or, in the case of a company carrying on business or having interests abroad, by more than
10 twelve months:

Provided that the Registrar if for any special reason he thinks fit so to do, may, in the case of any company, extend the period of eighteen months aforesaid, and in the case of any company and with respect to any year extend the periods of nine and twelve months aforesaid.

(2) The directors shall cause to be made out in every calendar year, and to be laid before the company in general meeting, a balance sheet as at
20 the date to which the profit and loss account, or the income and expenditure account, as the case may be, is made up, and there shall be attached to every such balance sheet a report by the directors with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend, and the amount, if any, which they propose to carry to the reserve fund, general reserve or reserve account shown specifically on the balance sheet, or to a reserve fund,
30 general reserve or reserve account to be shown specifically on a subsequent balance sheet.

(3) If any person being a director of a company fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be liable on conviction to imprisonment of either description for a term not exceeding six months or to a fine not exceeeing four thousand dollars:

Provided that a person shall not be sentenced
40 to imprisonment for an offence under this section unless in the opinion of the court dealing with the case, the offence was committed wilfully.

Signing of balance sheet.

130. (1) Every balance sheet of a company shall be signed on behalf of the board by two of the directors of the company, or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, and

the report shall be read before the company in general meeting, and shall be open to inspection by any member.

(2) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without having a copy of the auditors' report attached thereto, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding one thousand dollars.

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PART VI

WINDING UP

(ii) WINDING UP BY THE COURT

Cases in which Company may be wound up by the Court

Circumstances in which company may be wound up by the Court.

166. A company may be wound up by the Court if -

(1) ....

(2) ....

20

(3) ....

(4) ....

(5) ....

(6) The Court is of opinion that it is just and equitable that the company should be wound up;

(7) ....

No. 14 of 1963

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

BETWEEN :-

NG ENG HIAM — Appellant

- and -

NG KEE WEI (and others) — Respondents

CASE FOR THE APPELLANT

LOVELL, WHITE & KING,
1, Serjeants' Inn,
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London, E.C.4.

Agents for:

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