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53/1964

IN THE PRIVY COUNCIL No. 14 of 1963

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

I N T H E M A T T E R of KUALA LUMPUR HIGH COURT COMPANIES (WINDING-UP) No. 2 of 1961

- and -

I N T H E M A T T E R of SEMANTAN ESTATE(1952) LIMITED

- and -

I N T H E M A T T E R of the COMPANIES ORDINANCES 1940 to 1946.

B E T W E E N : NG ENG HIAM (Petitioner) APPELLANT

- and -

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

(Opponents) RESPONDENTS

CASE FOR RESPONDENTS

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1. This is an Appeal from an order of the Court of Appeal of the Federation of Malaya dated the 3rd December 1962 (Sir James Thomson Chief Justice of the Federation of Malaya and Mr. Justice Hill and Mr. Justice Syed She Barakbah Judges of Appeal of the said Federation)

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dismissing with costs the Appeal of the Appellant from an order of the High Court of the said Federation dated the 14th December 1961 (Mr. Justice Ong) dismissing with costs the Appellant's petition for the winding up of Semantan Estate (1952) Limited (hereinafter called "the Company").

2. The winding up is sought under Section 166 of the Companies Ordinance, 1940 of the Colony of the Straits Settlements as applied to the Federation of Malaya by the Companies Ordinance, 1946 of the Malayan Union (now the Malayan Federation). Under paragraph 6 of that Section (identical with paragraph (f) of Section 222 of the Companies Act, 1948) a company may be wound up by the Court if "the Court is of opinion that it is just and equitable that the company should be wound up". The question at issue on this Appeal is whether upon the petition herein and the evidence before the Court it is just and equitable that the Company should be wound up.

pp.1-9, pp.10-11, pp.16-18, pp.19-22, pp.11-15, pp.81-139

3. On the 23rd October 1961 the Appellants petition was filed. It was verified by the statutory affidavit. Two further affidavits by the Appellant affirmed on the 25th November 1961 and the 5th December 1961 were filed on his behalf. An affidavit of the Respondent Ng Kee Wei sworn on the 24th November 1961 was filed on behalf of the Respondents. The petition was tried on these affidavits and the exhibits thereto and there was no cross examination. The circumstances, as appearing therefrom and so far as material to this Appeal, are set out shortly in the next following paragraphs.

p.3 § 7, p.2 § 1, p.2 § 3

4. The Company was promoted by the Appellant and the Respondent Ng Chin Siu and incorporated in May 1952 as a private company limited by shares with a capital of $1,000,000 divided into 1,000 shares of $1,000 each all of which are issued and fully paid up. Half the shares are held by the Appellant and members of his family and the other half by the Respondent Ng Chin Siu and the other Respondents who are members of his family (except for ten shares registered in the name of a deceased son).

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5. The Company was formed to carry on business as rubber planters. Shortly after its incorporation it acquired the Semantan Estate in Pahang and subsequently in 1955 and 1956 the Batu and Segambut estates in Kuala Lumpur. It has worked these estates successfully and in a winding up there would be a substantial surplus for shareholders. p.3 § 4 p.3 § 5 p.3 § 6

6. In promoting the Company the intention of the Appellant and the Respondent Ng Chin Siu was to include such provisions in its constitution as would give them an equal share in the management of the business and preserve the equal voting strength of their two families. Accordingly under the Articles of Association they were appointed (and they still are) permanent directors for life (Article 82), the management of the Company is vested in them (Articles 99 and 83), the quorum for directors' meetings is two (Article 107) all shares confer one vote on a poll (Article 72) and neither at a directors' meeting nor at a general meeting has a chairman a second or casting vote (Articles 107 and 69). p.3 § 7 p.109 pp.114,110 p.117 p.106 pp.117,106

7. At the first directors' meeting held on the 22nd May 1952 the Respondent Ng Chin Siu was appointed chairman and the Respondent Ng Kee Wei (hereinafter referred to as "the Manager"), his eldest son and himself a shareholder, was appointed general manager. At all material times they have held and they still hold the said appointments. There is no evidence of any difficulties in the management of the Company's affairs until the latter part of 1957. Prior to that time the Appellant co-operated and made frequent visits to the registered office of 19 Ampang Road Kuala Lumpur where he inspected estimates, acquainted himself with details of sales of rubber, had numerous informal discussions and attended formal board meetings. p.5 § 13 pp.5-6 § 14 p.12 § 6

8. The Appellant alleges that during 1957 differences arose between him and the Respondent Ng Chin Sui as to the mode of p.6 § 15

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conducting the business. The following are the only two incidents particularised:

(a) on the 24th May 1957 at a directors' meeting the Manager claimed a special bonus for extra work done by him in connection with the acquisition of part of the Batu estate. The Appellant opposed the
p.13 §§ 7 claim and the bonus was not awarded.

(b) the Appellant introduced to the Company a contractor to fell trees on the Semantan Estate on a royalty basis; he complains that the Respondents Ng Chin Siu and the Manager, without his knowledge or consent, authorised another contractor to perform
p.13 §§ 8 the work at a lower royalty. The unchallenged explanation given on behalf of the Respondents is that the contractor nominated by the Appellant failed to sign a contract and stopped payment of a cheque given by him as a deposit, that a contractor nominated by the internal visiting agent was then accepted and undertook to construct a road for the estate use and that there had been a drop in the price of timber since the first contractor came forward. Further in answer to a complaint that the Appellant was unable to ascertain the precise circumstances of the contract, the
p.13 l.36 evidence shows that full information concerning this contract was and always had been available at the Company's
p.20 l.37 office and that, though the Appellant inquired in April 1958 about this matter, and despite the subject being on
p.21 l.10 the agenda at Directors' meetings, it was so far not pursued that these meetings were terminated before it was discussed.

p,12 §§ 6 9. Ill feeling developed between the Appellant and Ng Chin Siu. The Manager's
p.12. l.32 evidence is that the Appellant adopted an attitude which was obstructive and non-cooperative and that ill feeling arose not from the incidents aforesaid but from the refusal of the Respondent Ng Chin Siu to agree to the Appellants proposal for a

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voluntary liquidation. The Appellant's evidence shows that he made a series of efforts during 1958 and 1959 to secure a division of the assets of the Company between the two families or alternatively the winding up of the Company. pp.16-18

10. The Appellant makes further complaints relating to the period since 1957. First he complains that certain information which until 1957 had been regularly supplied to him was thereafter no longer supplied, and that he had made repeated requests for certain annual estimates and monthly accounts. p.7 §§ 17 p.7 §§ 18 He further complains that the books of account and other records are kept not at the Company's registered office but at the adjoining premises No. 21 Ampang Road which is also used as a private office of the Respondent Ng Chin Siu that by reason of the strained relationship it has not been possible for him to visit the said premises and make an inspection and that he has thus been deprived of his right of access to private information. The undisputed evidence of the Manager shows that all accounts and information which the Appellant might need were at all times available for his inspection, that no obstacle of any kind has existed to prevent him from making any investigation which he may think fit and that no discourtesy has ever been shown to him when visiting, as he has done on several occasions, the Company's registered office. The Appellant has not given evidence that he has made any attempt to inspect documents at No. 21, Ampang Road. p.14 §§ 11

11. The Appellant further complains that, except for three directors' meetings in 1958, there have been no directors' meetings since the beginning of that year, and that the Company's business has been conducted by the Respondent Ng Chin Siu (including sales of rubber and drawing of chequea) with the assistance of the Manager but without the Appellants concurrence. The Respondents' evidence shows that the failure to hold formal meetings was due to the obstruction of the Appellant and, on occasions, to his stipulation that he would not attend unless he was allowed pp.7-8 §§ 19 p.14 §§ 12

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to bring a lawyer with him to which the Respondent Ng Chin Siu objected. This has rendered it necessary to conduct some of the Company's
p.14 l.29 business without the Appellants express concurrence and it has become necessary to
p.12 l.41 hold meetings by means of circulars sent to and signed by the Appellant (see Article 113).
p.118 The Appellant does not allege that the Company has been or is unable to carry on its business.

p.8 §§ 20 12. The Appellant further complains because no annual general meetings were held during 1958, 1959 and 1960, because a meeting was convened for the 27th May 1961 by the Secretaries without the Appellant's authority, because the accounts for the years 1957 to 1959 which had not been signed by him were laid before the meeting and because his demand at the meeting for a poll on a resolution for an adjournment
pp.21-22 § 7
p.14 § 13 was disallowed. According to the indisputed evidence of the Manager the failure to hold the said meetings was due solely to the Secretaries' doubt whether they had power to convene general meetings without the Appellant's authority and eventually they decided to do so without it. The Respondents submit that the disallowance of the demand for a poll was
p.106 required by Article 70 which provides that "no poll should be allowed on any question of adjournment" and if, contrary to this submission the disallowance was irregular it
p.130 l.26 was made bona fide on the advice of a solicitor.

13. The Appellant contends that it has become impossible to conduct the business of the Company according to law and the regulations of the Company. He does not allege that any of the acts complained of have been taken otherwise than in good faith in the interests of the Company nor that they were fraudulent or in any way dishonest. The Respondents on the other hand claim that the Company's affairs have throughout been properly managed in accordance with the requirements of the Articles of Association and of the law and despite the Appellant's obstruction which has rendered it necessary for the business to proceed without his express concurrence. The Respondents contend that the lack of co-operation from and

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obstruction by the Appellant has no legal justification and that from the moment that ill-feeling developed between him and Ng Chin Siu he has sought to bring about a winding up of the Company.

14. The Appellant's petition was presented on the 23rd October 1961. It came on for hearing before Mr. Justice Ong on the 14th December 1961; was supported by the members of the Appellant's family and opposed by the Respondents. On the same day he dismissed the petition. On the 15th December 1961 the Petitioner gave notice of appeal to the Court of Appeal against this decision. p.9 1.21 pp.23-25 p.32 doc.9

15. Mr. Justice Ong subsequently gave his written reasons in his "Grounds of Judgment" dated the 14th February, 1962 He found that the two incidents in 1957 above referred to were of a trivial nature considering the magnitude of the Company's operations and expressed himself as clearly of the opinion that they were the root cause of all the ensuing friction. Further he found that all the subsequent complaints of the Appellant flowed from nothing more than the pique he felt from the events of 1957, that there were no grounds for absence of trust on the part of the Appellant, that absence of congeniality could have been and could then still have been overcome, that the Appellant had been more unreasonable than co-operative and that any deadlock, so-called, was one created entirely by him. He further held that wounded pride on the part of the Appellant could not make it just and equitable that the Company should be wound up and, even regarding the Company as a partnership, he stated that he had in mind as particularly appropriate what was said in Linley on Partnership (11th Edition) p. 692: pp.34-40 doc.10. p.35 1.34 p.39 1.3 p.39 1.37 p.39 1.48 p.39 1.49 p.39 1.50 p.40 1.13 p.40 1.20

> "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 impossibility so created by himself."

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pp.41-43 doc.11

16. On the 21st March 1962 the Appellant lodged a memorandum of appeal from the said decision which set out the grounds of appeal. On the 15th and 16th October 1962 the Court of Appeal heard argument. On the 3rd December 1962 the Court delivered judgment dismissing the appeal with costs both there and in the Court below. The formal order to the effect is printed on p.79 of the Record.

pp.44-65

pp.65 et seq.

p.65 l.31 — p.66 l.1.

17. The Learned Chief Justice proceeded on the basis that there was no general rule to be applied as to when it is just and equitable that there should be a compulsory winding up, and relied upon the dictum of Lord Shaw of Dumfermline in Loch v. John Blackwood Ltd. (1924) A.C. 783, 788, that the Court in the consideration of the justice and equity of pronouncing an order for winding up "ought to proceed upon a sound induction of all the facts of the case." He deduced from a consideration of the Articles of Association that the resolution of any difference between the two Permanent Directors was thereby rendered a matter of virtual impossibility since there was no provision for a domestic forum in which differences could be determined. He inferred that both Permanent Directors undertook to display a more than usual forbearance and tolerance of each other's point of view and he approached the facts on that basis. He accepted that the only cause of the differences between them were the two incidents referred to and that if the Appellant had allowed them to lead him to a state of mind when he thought that co-operation was impossible then he was failing in the obligation to exercise tolerance and forbearance which he had undertaken.

p.66 l.11

p.66 l.31

p.67 l.2.

p.67 l.15.

p.67 l.25

18. In these circumstances the Learned Chief Justice did not consider it necessary to consider whether there had been minor technical breaches of the Company Law. He found it remarkable that there was no suggestion that the Company was not making money or that it would make more money if the permanent directors were on speaking terms: there was no question that the substratum had gone or that the business could not be or was not being carried on and indeed efficiently carried on; there was no suggestion of the

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slightest lack of probity or either side seeking to obtain an unfair advantage over the other or making an unfair profit or anything of the sort. He concluded that he did not see any reason why there should be a winding up and still less why he should interfere with the discretion of the trial judge. p.67 l.39

19. Mr. Justice Hill attached little importance to the incident of the claim for a bonus as it was dropped and no cause for dissension therefore remained. He concluded that the Respondent's explanation of the second incident relating to the felling contract was reasonable and should have satisfied the Appellant. p.73 l.8. p.74 l.8.

20. The Learned Judge found no justification for a lack of trust. So far as congeniality was concerned, he held that as between directors of a rubber estate this seemed no more than desirable. He found that the Appellant's dissatisfaction arose in addition to the two main causes from matters which when regarded singly appeared to the Learned Judge to be inconsequential and which he considered in toto appeared to have been reasonably explained by the Respondent. p.74 l.42. p.75 l.2.

21. Mr. Justice Hill considered the irregularities alleged fell outside the scope of the real issue in the case, namely, whether there was a deadlock due to differences between the Permanent Directors and he further considered that a stage of such continued quarrelling and animosity had not yet been reached between the two as precluded by reasonable hope of reconciliation and friendly co-operation and he therefore concluded that this was not an instance where a winding up order would be just and equitable and that Mr. Justice Ong had properly exercised his discretion in refusing such an order. p.76 l.10. p.76 l.38. p.76 l.44.

22. Mr. Justice Barakbah considered there was some quarrelling and dissatisfaction between the two Permanent Directors but was of opinion that they were not as serious as the Appellant had made them out to be. In his p.78 l.4.

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judgment the general principle underlying the author-
p.78 l.15. ities for a winding up on the grounds of deadlock was that the parties must reach such a state of deadlock that it would be impossible to carry on the business any longer. He felt that it
p.78 l.26. would not be impossible for them to resolve their differences and carry on the spirit of co-operation that had existed from 1952 to
p.78 l.30 1957. He noted that the Company was in a flourishing condition and in the circumstances of the case it appeared to him that it would not be in the interests of the shareholders to have the business wound up and concurred in the dismissal of the Appeal.

p.79 doc.18. 23. The formal Order dismissing the Appeal was made on the 3rd December 1962. The Appellant being dissatisfied with the said judgment of the said Court of Appeal applied for leave to
p.80 doc.19. appeal therefrom and by an Order of the said Court dated 15th April 1963 final leave was granted to the Appellant to appeal to His Majesty the Yang di-Pertuan Agong.

24. The Respondents respectfully submit that the appeal of the Appellant should be dismissed for the following, amongst other

REASONS

(1) Because there is no deadlock.

(2) Because such difficulties as exist in managing the affairs of the Company have been caused by the acts of the Appellant and with a view to precipitating a winding-up.

(3) Because the evidence shows that the Company is flourishing and is being carried on efficiently.

(4) Because the complaints made by the Appellant are trivial and do not justify a petition to wind up.

(5) Because the two main complaints of the Appellant have ceased to be matters of complaint.

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(6) Because there is no suggestion of bad faith, impropriety or dishonesty or of lack of probity on the part of any of the Respondents or of any deprivation of any rights of members.

(7) Because such irregularities as then may have been under the Ordinance and the Articles of Association are purely technical and do not justify a winding up and because, moreover, any such irregularities are due in part to the conduct of the Appellant.

(8) Because the findings and judgment of Ong J. and the Court of Appeal were right.

(9) Because it would not be just or equitable that the Company should be wound up.

KENNETH MACKINNON

PETER CURRY

No. 14 of 1963

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

RE SEMANTAN ESTATE (1952) LTD.

RE THE COMPANIES ORDINANCES 1940 to 1946.

BETWEEN

NG ENG HIAM (Petitioner) Appellant

- and -

NG KEE WEI
NG CHIN SIU
and others (Opponents) Respondents

CASE FOR RESPONDENTS

PEACOCK & GODDARD,
1, Raymond Buildings,
Gray's Inn,
W.C.1.