A

IN RE BALI HAI

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.), 16th, 26th November]

Civil Jurisdiction

B *Company law—winding up—differences between shareholders—whether just and equitable that company should be wound up—Companies Ordinance (Cap.* 216) *s.* 167.

The company was incorporated as a private company in 1972 with four shareholders amongst whom severe differences soon arose. Two shareholders withdrew from active management in the business in 1974, and both subsequently resigned as C directors just before they presented their petition for winding-up.

The judge held that there had been a complete lack of confidence between shareholders, and that these differences were irreconciliable. There was no prospect of running the company under a basic obligation of equal management, and therefore the only just and equitable solution was to wind up the company.

D *Held:* (Marsack J. A. dissenting) The judge was correct in making the order for the winding-up of the company.

Cases referred to:
Ebrahimi v. Westbourne Galleries Ltd. & Ors [1973] A.C. 360; [1972] 2 All E.R. 492.
E *Const v. Harris* [1824] *Turn & Rus. 496.*
Blisset v. Daniel [1853] 10 Hare 493.
Yenidje Tobacco Co. Ltd In re [1916] 2 Ch. 426.
Lock v. John Blackwood Ltd. [1924] A.C. 783.
Fildes Bros Ltd. In re [1970] 1 All E.R. 923; [1970] 1 W.L.R. 592.
Lundie Brothers Ltd. in re [1965] 2 All E.R. 692; [1965] 1 W.L.R. 1051.
Agriculturist Cattle Insurance Co. In re [1849] 1 Mac. & G. 170.
F

Appeal from the decision of the Supreme Court making an order for the winding up of a company.

R. W. Mitchell for the appellant.
M. Tapoo & U. Mohammed for the respondent.

G

The following judgments were read:

SPRING J.A.: [26th November 1976]—

This is an appeal from the decision of the Supreme Court given at Suva on the H 19th February 1976 in which an order for the winding up of the company known as Bali Hai Restaurant Limited was made. The facts briefly are as follows. The company was incorporated as a private company under the Companies Ordinance Cap. 216 on the 13th March 1972. The nominal capital is $50,000 divided into 50,000 $1 shares and issued to the following shareholders—Francis Ravendra Kumar

$10,000; Jaffar Ali $15,000; J.G.B. Crawford $15,000 and A. Qumi $10,000. The business of the company is a restaurant and night club proprietor and it commenced operations on 2nd August 1973. Clearly, it was, the joint contemplation of the four shareholders that they would actively participate in the running of the business; each of them was appointed a director of the company. Serious differences soon arose between the four shareholders as to the conduct of the business. Francis Ravendra Kumar withdrew from the active management of the business on 17th May 1974 and Jaffar Ali in July 1974. Francis Ravendra Kumar resigned as a director on 14th November 1974. In December 1974 Messrs. Crawford and Qumi endeavoured to increase the number of their shares in the captial of the company by purporting to convert arrears of salary and other moneys owing to them into additional shares so that they would have increased voting rights and thereby obtain control of the company.

The learned judge found there was a distinct lack of confidence between the shareholders and that they were irreconciliable. Various attempts had been made to resolve their differences. Discussion took place in December 1974 regarding the sale of shares in the company and the learned judge found:

> "According to the first petitioner's sworn evidence the question of sale of shares was again discussed at this meeting but the price asked by the two petitioners was, with justification, considered too high by Crawford and Qumi. Crawford and Qumi would also appear to have been reluctant to sell their shares to the two petitioners. The result was a deadlock."

On the 9th April 1975 the solicitors for Messrs. Kumar and Ali wrote to Messrs. Crawford and Qumi setting out in some detail their complaints about the management of the company and asking that the assets of the company be kept intact. No reply was received to this letter. On 23rd May 1975 a notice was sent to Messrs Crawford and Qumi by the solicitors for Messrs. Kumar and Ali advising that a petition for winding up the company would be presented to the Supreme Court and setting out the proposed grounds. No reply was received to this notice. Jaffar Ali resigned as a director on the 23rd May 1975. On 6th June 1975 a petition for winding up the company was presented to the Supreme Court by Messrs. Kumar and Ali.

Evidence was given by Francis Ravendra Kumar alone; no other evidence was given although certain uncertified financial accounts were put before the lower court by consent at the end of the hearing. Certain creditors supported the petition for winding up while others opposed it. The learned trial judge at the close of the case made an order for the winding up of the company upon the ground that it was just and equitable so to do.

There were 10 grounds of appeal filed but they can be summarised by saying that the appellant seeks to have the winding up order set aside on the premise that the circumstances as found by the learned trial judge do not support a finding that it is just and equitable that the company should be wound up.

The Companies Ordinance (Cap. 216) section 167 states:

> "167. A company may be wound up by the court if—
>
> .....
>
> *(f)* the court is of opinion that it is just and equitable that the company should be wound up."

A At the hearing of this appeal counsel for the appellant sought leave to palce before this court certain uncertified accounts covering the trading of the company for the period from July 1975 up to September 1976. No motion seeking leave to adduce these accounts before this court had been filed. The respondents, who had not seen the accounts, objected to their production; this court refused to allow the accounts to be placed before it.

B The learned trial judge found that the company was intended to be a small private organisation with each of the four shareholders having active participation in the business. Early in January 1975 the differences between the shareholders became marked and Francis Ravendra Kumar in giving evidence before the Supreme Court said:

> "The meeting was held on 17th December 1974. All four directors attended. It was adjourned to 14th January 1975. On 17th we were not successful in changC ing the management, which we wished. On 17th December 1974 we were not told that Mr Qumi's and Mr Crawford's shares had been increased. We found this out on 14th January 1975. Mr Crawford's share had been increased by $4,000 and Mr Qumi's by $3,000. This was done by converting arrears of their salaries. We were surprised. We did not know this had been done. No general meeting had been held."

D He said further:

> "Until 1975 I have not been shown the minutes of company's meetings. Nor have I been shown the company's accounts. Through my own efforts I obtained some figures from the company's auditors. No general meeting has ever been held of the company. I also say that no proper accounts have been kept by the company. Whatever accounts they have are not kept at the registered office. I E have checked at the registry office, no register of member, no annual returns have been filed there....."

Again, he said:

> "
> .....
> Since 14th January 1975 I have been to the City Bank once or twice. Have also spoken to the company's creditors. I found that company had not been banking F any money. Creditors were being paid in cash, not by cheque. This surprised us. When I was director creditors were always paid by cheque. As far as I know the company has never lodged an income tax return."

It is to be noted that the respondents Messrs. Crawford and Qumi did not give evidence before the Supreme Court, nor were they examined or cross examined on the uncertified accounts submitted to that court.

G Counsel for the appellant, on this appeal, argued that as the company was now in better heart financially, and, the business was being run smoothly by Messrs. Crawford and Qumi that the order for winding up should be set aside.

Counsel for the respondent submitted that the company was being run by two shareholders to the total exclusion of the respondents who between them held 50% of the issues share capital—a circumstance, he submitted, that was not envisaged H when the company was formed; Messrs. Kumar and Ali could not get their money out of the company; there was a complete lack of confidence between the contributories which had culminated in the withdrawal from the business of Messrs.

Kumar and Ali and their subsequent resignations from the directorate. It was argued that while there had not been any expulsion from the comapny the appellants by their conduct had left the respondents no other alternative than to take the course of action they did. The question now is—was the learned judge in the court below correct when he made an order winding up the company on just and equitable grounds. In *Ibrahimi v. Westborne Galleries Ltd. & Ors.* [1973] A.C. 360 Lord Wilberforce reviewed the considerable line of cases which have dealt with this type of petition and at p. 379 said:

> "My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

In some of the cases of winding up, the approach has been that the members of a small company are in substance partners or quasi partners and that a winding up order may be made if circumstances exist which could 'justify a dissolution of partnership between them on just and equitable grounds'. Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* (supra) at page 379 said:

> "It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obsure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

"The just and equitable" principles applicable to a partnership are stated in "Lindley on Partnership" (6th Edition) at p. 657:

A "Refusal to meet on matters of business continued quarelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation, have been held sufficient to justify a dissolution. It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

B

However, it has been held to be wrong to create categories or headings under which cases must be brought if the just and equitable principles are to apply; the generality of the words is not to be reduced in that way. In *Ebrahimi's* case (supra) Lord Wilberforce suggested some of the factors which may arise at p. 379:

C "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following

D elements:

(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company;

E (ii) an agreement, or understanding that all, or some (for there may be 'sleeping' members) of the shareholders shall participate in the conduct of the business;

(iii) restriction upon the transfer of the members' interest 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."

F The respondents complained that as a result of the complete breakdown in confidence between them coupled with the conduct of the appellants they have been forced to resign and consequently ousted from active management participation; that the moneys invested by them cannot be taken out of the company with resulting injustice to them; they are receiving no devidends and that the machinations of Messrs. Crawford and Qumi in endeavouring to obtain control of the company, while it brought no practical benefits to them, spelt complete enathema to the trust

G that the respondents reposed in them as working shareholders; and finally that the relationship on which they became shareholders in the company had irretrievably broken down.

The entitlement to management participation is one of the important factors that the court take into account as was stated by Lord Wilberforce in *Ebrahimi's* case (supra) at p. 380:

H "The just and equitable provision nevertheless comes to his assistance if he can point to, and prove some special underlying obligation of his fellow member(s) in good faith, confidence, that so long as the business continues he shall

be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management (see *Const v. Harris* (1824) Tur. & Rus. 496, 525) even where under the partnership agreement there is a power of expulsion (see *Blisset v. Daniel* (1853) 10 Hare 493; *Lindley on Partnership,* 13th Ed. (1971) pp. 331, 595)."

The courts have, in cases where there is a deadlock in a company, applied the just and equitable principle in making orders for winding up. While this company Bali Hai Restaurant Limited, is still operating under the management of Messrs. Crawford and Qumi the learned judge found that it was:

"Difficult to escape the inference that the purported increase in the capital by Crawford and Qumi on 14th January 1975 was designed to oust the authority of the two petitioners as equal shareholders."

In *re Yenidje Company Limited* [1916] which was a case of two equal director shareholders with an arbitration provision in the articles, between whom a state of deadlock came into existence, Lord Cozens-Hardy p. 432 says:

"If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible. We are told that we ought not to do it because the company is prosperous, making large profits, rather larger profits than before, the disputes became so acute. I think one's knowledge of what one sees in the streets is sufficient to account for that, having regard to the number of cigarettes that are sold, and we can take judicial notice of that in judging whether the business is much larger than it was before. Whether such profits would be made in circumstances like this or not, it does not seem to me to remove the difficulty which exists. It is contrary to the good faith and essence of the agreement between the parties that the state of things which we find here should be allowed to continue."

It is clear from the evidence that in this case there is a complete lack of confidence between the shareholders. I am mindful that the lack of confidence, must be a justifiable lack of confidence as was stressed in *Lock v. John Blackwood Ltd.* [1924] A.C. 783 at p. 788 but I believe the learned judge came to this conclusion when he said:

"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."

Further, it appears that the future running of this company under the basic obligation of equal management participation is out of reasonable contemplation. As the learned trial judge said:

A "Crawford and Qumi alone are taking an active part in the management of the company's business and, presumably, drawing salaries from the company's funds. The two petitioners derive no benefit whatever from the business. This could not have been in the contemplation of the parties when the company was incorporated."

Counsel for the appellant submitted that the financial position of the company had improved since the date of the winding up order, but there was no evidence to
B support this. However, the question whether it is just and equitable to wind up a company within the meaning of section 167 of the Companies Ordinance must be answered on the facts which exist at the time of the hearing of the petition. *Re Fildes Bros. Ltd.* [1970]1 All E.R. 923.

In my view the learned judge in the court below was correct in making an order for the winding up of the company on the ground that it is just and equitable. Accor-
C dingly, I would dismiss the appeal with costs to be taxed.

MARSACK J. A.

In this case the learned judge in the Supreme Court made an order for the winding up of the company known as Bali Hai Restaurant Limited on the grounds that it was just and equitable to do so, having regard to the fact that there were irreconcilable differences between the parties which would not permit the business of the
D company to be conducted smoothly, at least not without causing injustice to two of the four shareholders.

The company was incorporated for the purpose of conducting a night club restaurant in Suva. The paid up captial was $50,000; J.G.B. Crawford and Jaffar Ali each held $15,000 shares; A. Qumi and Ravendra Kumar each $10,000 shares. The company commenced operations in August 1973. All four shareholders were
E appointed directors; each was to play some part in running the company and would receive remuneration in the form of directors' fees. Differences arose among the shareholders as to the management of the business; Ravendra Kumar withdrew from any active part in the business in May 1974 and Jaffar Ali in July 1974. Later they each resigned their directorships; Ravendra Kumar in November 1974 and Jaffar Ali in May 1975. They took steps to have Crawford removed from the position of
F managing director and to have one of themselves appointed to that office; but they did not control enough voting power to enable this to be done.

At one stage Crawford and Qumi sought to acquire additional shares in the company by diverting their areas of directors' fees to that purpose; but as the learned judge in the Supreme Court held, this purported increase in capital was irregular and contrary to the articles of association. Accordingly, the shares remained at the same level as they had been when the company was incorporated. On the 6th June
G 1975 Ravendra Kumar and Jaffar Ali filed a petition under the Companies Ordinance asking that the company be wound up by the court, and on the 19th February 1976 the order was made on the grounds which have already been stated.

At the hearing of the appeal counsel for the appellant sought to put before the court statements of account showing how the company had fared since 30th June 1975, the last date up to which statements had been produced to the Supreme Court.
H Counsel for the respondents objected to the admission of those statements, and as they were not properly proved the court ruled that they could not be received.

Although the basis of the learned judge's decision is that the irreconciable differences among the parties made it just and equitable that the company should be wound up, there is some confusion in the evidence in support of the petition as to the reasons for the action brought by the petitioners. The only witness called at the hearing was the first petitioner Ravendra Kumar, and in the course of his evidence he stated:

> "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 question at issue in the present appeal is whether the circumstances disclosed in the evidence made it just and equitable that the company should be wound up. Considerable stress was laid on the action of Crawford and Qumi in purporting to increase the capital of the company in January 1975. The learned judge held that this action was designed to ourst the authority of the two petitioners as equal shareholders." I agree that this was a reprehensible action on the part of Crawford and Qumi; but as the learned judge points out, it was of no practical effect.

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

> "Continued quarrelling and such a state of animosity as preclude all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution."

That state of affairs does not, in my view, exist here. In the course of his judgment the learned judge says:

> "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."

In a business such as this, it is well recognised that there will be difficulties at the start and that it will be some time before a business can be made to operate smoothly and profitably, so that it may acquire what is known in commercial circles as goodwill. The statements produced before the court below indicate that the losses which were incurred—as could only be expected in the early stages, have now been conver-

ted into a small profit if the tax allowances for depreciation of the company's material assets be not taken into account. There is no evidence that the business of the night club restaurant is not running smoothly. If the company is wound up and the assets sold by a liquidator, substantial capital losses can be expected.

The bona fides of the petitioners is in my opinion, far from being established. Although there was justification for their annoyance over Crawford's attempt to reduce the petitioners to minority shareholders, his efforts in the direction were, on legal grounds, futile. At a meeting in January 1975 there was some discussion on the subject of the purchase of petitioners' shares by Crawford and Qumi. The first petitioner stated in his evidence in the court below that the creditors could not be paid; but he wanted $15,000 for his $10,000 shares and stated that the second petitioner Jaffar Ali wanted $30,000 for his $15,000 shares. This indicates, to my mind, that they had no intention of settling the matter amicably. Their object would seem to be, now that they had voluntarily withdrawn from the activities of the company, to ensure that Crawford and Qumi would not be allowed to carry on with the business which showed some signs of making progress. It may perhaps, be said, as the learned judge does in his judgment, that a deadlock has been created. But this type of deadlock is one quite distinguishable from that referred to in the cases already cited. This deadlock results from the refusal of the petitioners to co-operate at all with the directors who are managing the business. This deadlock does not in any way hinder or even detrimentally affect the management of the business, which continues to operate and, as has been pointed out, to make some progress. The court should in my view, apply the principle enunciated by Lord Cottenhan L.C. in *Re Agriculturist Cattle Insurance Company* (1849) 1 Mac & G 170:

> "There must be something in the management and conduct of the company which shows the Court that it should be no longer allowed to continue and that the concern ought to be wound up."

It would be quite wrong, in my view, to allow what appears to be a recalcitrant attitude on the part of the petitioners to close down, with distressing results to all shareholders, a business which shows signs of developing into a profitable enterprise.

Accordingly, I find myself, with respect, unable to agree with the learned judge that there appears no practical way out. The practical way out, to my mind, is to allow the business to continue to operate; with every prospect that the financial interest, not only of Crawford and Qumi but also of the petitioners themselves, will be better protected thereby than they would on the compulsory winding up of the company.

For these reasons I would allow the appeal and quash the order for winding up. In view of the conduct of the parties, I would make no order for costs.

GOULD V. P.

I have had the advantage of reading the judgment of Spring J.A. in this appeal and I agree with his reasoning and conclusions. I do not find in any of the material argued on the appeal, adequate reason for holding that the learned judge in the Supreme Court erred in his assessment of the situation which has arisen among the shareholders of the company or in his decision to make the winding up order.

I agree with Spring J. A. that the appeal must be dismissed with costs to be taxed and, this being the majority opinion, it is so ordered. A

Appeal dismissed.

In a further appeal, the Privy Council allowed an appeal against the making of an order for winding up. The decision of the Privy Council is reproduced at page 223 post.

B