SENEVIRATNE
v.
SENEVIRATNE AND ANOTHER

SUPREME COURT
WANASUNDERA, J., VICTOR PERERA, J., AND COLIN-THOMÉ, J.
S.C. APPLICATION 14/81.
C.A. APPEAL NO. 46/74(F).
D.C. COLOMBO 1556/SPL.
MAY 25, 1982.

Companies Ordinance, sections 153A, B, D. – Winding-up – Deadlock among Directors – Winding up order appropriate – Impossibility of ordering one shareholder to purchase shares of others.

The petitioner, first respondent and second respondent were brothers and shareholders in a company called 'Kadirana Mills Ltd.' duly incorporated under the Companies Ordinance.

The first respondent was sole Managing Director while the second respondent was a Director and Secretary.

The petitioner made an application in terms of section 162(b) of the Companies Ordinance to wind up the Company.

The District Judge found that there was no mismanagement or oppression but there was disharmony among the brother shareholders and as a result there was a complete deadlock and the Directors could not function and business had come to a complete standstill.

On these findings the District Judge ordered a winding-up declining to make order that the shares of the petitioner and second respondent be purchased by the first respondent.

On appeal by the first respondent the Court of Appeal reversed the order of the District Judge.

The petitioner appealed to the Supreme Court seeking restoration of the District Judge's order.

Held –

1. That as the business of the Company could not be carried on and was not being carried at the times material to the proceedings, a winding up order would not be prejudicial to the interests of any one member or members.

2. Since there were only three shareholders no order that the first respondent purchase shares of the other two shareholders could be made under section 153(B) or (C) without violating prohibition regarding minimum number of shareholders prescribed in Section 29 of the Companies Ordinance or without violating the Company's own Articles of Association.

Case referred to:

(1) *Re Antigen Laboratories Ltd. (1951) 1 A.E.R. 110.*

APPEAL from Judgment of the Court of Appeal.

M. Kanakaratnam with *C. Selvarajah* for the appellant.

H.L. de Silva, S.A., with *K.N. Choksy, S.A.*, and *H. Soza* for the respondents.

Cur. adv. vult

May 26, 1982.

VICTOR PERERA, J.

The petitioner had made an application on the 3rd March 1972 to the District Court of Colombo in terms of section 162(6) of the Companies Ordinance (Chap.145) to have the 'Kadirana Mills Limited' a duly incorporated private Company wound up on the grounds urged in his petition. The 1st respondent a Director who was also the sole Managing Director at the time and the 2nd respondent the other Director who was also the Secretary of the Company took part in the proceedings. The 1st respondent objected to the Company being wound up while the 2nd respondent supported the petitioner's application. After a lengthy inquiry in which the petitioner, the 1st respondent and the 2nd respondent gave evidence, the District Judge arrived at the conclusion that no acts of oppression or mismanagement were proved. However, he found that there had been disharmony and dissension among the three shareholders who were brothers, and that there was a complete deadlock as a result of which the shareholders or the Directors could not function and that the affairs and business of the Company had come to a standstill. On the basis of these findings the Court held that it was just and equitable that the Company be wound up and made order accordingly.

During the course of the proceedings in the District Court the 1st respondent invoked the provisions of section 133(D) of the Companies Ordinance (in terms of the amendment No. 15 of 1964) and called upon the Court instead of making a winding up order to order him to purchase the interests or shares of the petitioner and the 1st respondent. The Court declined to make this alternative order as it held that no case of oppression was made out as contemplated in section 153A or any mismanagement as contemplated in section 153B had been established. It further held if it made such an order, there would be only one member left and the Company as such would cease to exist..

The 1st respondent appealed against this order to the Court of Appeal. The Court of Appeal by its order dated 24th November 1980 reversed the order of the District Court. The petitioner has appealed to this Court from the order of the Court of Appeal and sought to have the order of the District Court restored.

At the hearing before us, the findings of the District Judge on the facts were not canvassed. The decision that it was just and equitable to wind up the Company too was not challenged. It was contended for the petitioner that there should have been a written application for relief as provided for by the provisions of section 153A or section 153B before a Court could act in terms of section 153D. It must be noted that the amending Act No. 15 of 1964 introduced these sections under the heading 'Prevention of Oppression and Mismanagement' and sought to provide alternative remedies to wind up in cases of oppression and mismanagement in sections 153A and 153B. It provided clearly as to who could make such applications for relief under these sections and also for the orders a Court could make on such facts being established to its satisfaction. In regard to such applications in the case of *Re Antigen Laboratories Limited* (1) Rosburgh, J. held that a petitioner seeking relief under section 210 of the Companies Act of 1948 (which is almost identical with section 153A of Act No.15 of 1964) ought to state in the prayer of the petition in clear terms the general nature of the relief sought so as to leave no doubt as to what the petitioner requires the Court to do.

The present case was not such an application but an application for a winding up order. But at some stage of the proceedings the Court had been invited to act under section 153D which reads as follows:-

> "Notwithstanding the provisions of Part V of this Ordinance at any stage of the winding up proceedings in respect of a Company where a Court is of opinion that to wind up the Company would be prejudicial to the interests of a member of the Company, it shall be lawful for the Court to act under section 153A or 153B in like manner as if an application has been made to Court under either of those sections.

This section clearly contemplates a situation in winding up proceedings where the Court could be called to make an order it would have made in an application for the alternative remedies though the application was for winding up. Section 153D made it lawful for a

Court where an application had been made for winding up of the Company, to order the alternative remedy if the Court formed the opinion that to wind up the Company would *'be prejudicial to the interests of a member of a Company'*. This was not a consideration that a Court had to be guided by in disposing of an application under section 153A or 153B and therefore a Court could not be restricted to considerations that arise in such applications.

In section 153A provision is made for any member or members to complain to Court that the affairs of the Company are being conducted in a manner oppressive to any member or members (including the member or members with the complaint) and if the Court is of the opinion that the affairs of the company are being conducted in a manner oppressive to any member or members and to wind up the Company would unfairly prejudice *such member or members*, it could make an order to remedy the matters complained of. The principal consideration here is the interests of the *oppressed member* or members and the Court by its order eliminates the oppression complained of.

In section 153B provision is made for any member or members to complain to Court that the affairs of the Company are being conducted in a manner *prejudicial to the interests of the Company* or that it is likely that the affairs of the company will be conducted in such a manner. The Court has to decide upon the order best suitable to remedy or prevent the matters complained of or apprehended considering the interests of the Company.

Under both sections the Court endeavours by its orders to secure the continuity of the existence of the Company to enable it to function properly and to carry on its business by removing the sources of oppression or by regulating the management of the affairs of the Company. But under section 153D the Court is dealing with an application for winding up which need not necessarily be only on the ground of oppression or mismanagement but also on other grounds such as the failure of the objects of the Company, a complete deadlock in management or other facts which justify a Court forming the view that it is just and equitable to order a winding up. In a proceeding initiated for the winding up of a Company the Court will either make an order that the Company should be wound up or that the petition should be dismissed. But section 153D, enables a Court instead of acting in this manner to consider and determine an

alternative remedy as though such a remedy had been applied for. When this section is invoked the Court will have to form the further opinion that to wind up the Company would be *"prejudicial to the interests of a member of the Company"*. The consideration of eliminating oppression by giving relief to the oppressed does not arise as the member here referred to is not necessarily an oppressed member unlike in section 153A. Therefore in winding up proceedings, if section 153D is invoked, the grounds for an application for relief under sections 153A or 153B are not a pre-requisite for the Court to grant relief. However, it will be necessary to lead some positive evidence in regard to the nature of the interest of the particular member in order to ascertain whether such interest would be prejudiced by a winding up of the Company.

As this aspect of the matter had not received due consideration in the District Court and in the Court of Appeal, I have examined the evidence to ascertain the interests of each of the three members and the prejudice, if any, that one of such members would suffer if a winding up order is made. As far as the petitioner is concerned, he had merely been a shareholder who did not take an active interest in the management of the Company and had not received any dividends from 1960 to 1971. He could not be prejudiced by a winding up order and it would be in his interests to obtain such an order. The 2nd respondent was a Director and the Secretary. From 1959 to 1970 he had received the same amount by way of Director's fees and bonus as the 1st respondent totalling to Rs. 70,750/-. He too received no dividends after 1960. The 1st respondent however was a joint Managing Director with his brother Ivan till Ivan's death in 1952. From 1952 he functioned as the sole Managing Director for which he was paid a salary of Rs. 16,200/- from 1963 to 31.3.1972. From 1942 when he was only 42 years of age, he had been paying himself a *retiring gratuity* of Rs. 3,600/- per year as according to his evidence he had intended to retire from the Office of Managing Director. After the Mills, where the sole business was then being carried on, were destroyed by a fire in November 1971, the business of the Company had come to a standstill. The Mills were never reconstructed thereafter. A sum of Rs. 275,000/- paid by way of compensation by the Insurance Corporation had been deposited with the Provisional Liquidator appointed in 1972. According to the 1st respondent the other assets such as the vehicles had become of no use for the Company's business. Of the only other assets of the Company there are three houses in Negombo, one is occupied by

the 1st respondent himself and the other two houses were being used by the 1st respondent, but no rents have been credited to the Company at any time. The totality of the evidence led shows that the Company had not been functioning from 1971, no business of the Company in terms of its Memorandum is being carried on, the substratum of the Company is gone and each of the three members is adversely affected for want of the proper utilization of the assets of the Company, the deterioration of the assets and the absence of a proper accounting of rents and the Company has ceased to be a profitable undertaking.

In the light of this evidence the Court could not form an opinion that an order to wind up the Company would be prejudicial to the interests of any one of the members even the 1st respondent. A winding up order would be beneficial to the interests of all the members of the Company under these circumstances. The fact that the 1st respondent had stated in evidence that he had devoted the entirety of his time in managing the affairs of the Company during the time the business of the Company was being carried on, is not a relevant consideration as the business could not be carried on and was not being carried on at the dates mentioned in these proceedings.

The other matter that was raised at the argument of this appeal was whether the Court of Appeal was correct in ordering the 1st respondent to purchase the interests of the petitioner and 2nd respondent considering the particular circumstances of this case. In 1972 when the winding up application was made there were only three registered shareholders, the petitioner and the two respondents. According to the Articles of Association of this Company (P2) by Clause 2 the business of the Company had to be carried on by the Managing Director under the direction of the Board of Directors and subject to the control of general meetings. According to Clause 2 (a) the number of Directors of this Company was fixed at a minimum of two. According to Clause 46(a) the seal of the Company shall not be fixed to any instrument except in the presence of two or more Directors. Therefore a purchase of the shares of the petitioner and the 2nd respondent by the 1st respondent even though it is by an order of Court, would result in the Company which by law must have at least two shareholders having only one shareholder and one Director. The District Judge quite correctly therefore had no alternative but to order that the Company should be wound up. Section 29 of the Companies Ordinance, under the heading "Reduction of Number

of Members below *Legal* Minimum" with a side note reading "*prohibition* carrying on business with fewer than seven or in the case of a private Company two members" provided that every person who is member of a Company, where the number of its members had been so reduced for more than six months while the number is so reduced during the time it carries on business after the said six months will be personally liable for the payment of the entirety of the debts of the Company and is liable to be so sued. No doubt the Company continues to exist and becomes liable to be wound up under section 162(4) but the Company does not become liable and it is unable to function as a Company in terms of its Articles of Association. The alternative remedy provided by sections 153A, 153B and 153E seems to imply that a Company should not merely remain in existence, but should also have the capacity to function legally in terms of its own Articles and thereby to carry on business as a Company and answerable for its liabilities. If the Company merely continues to exist in an imperfect state but is unable to function and to carry on business binding on the Company, the Court would not be justified in granting the alternative remedy.

Therefore the only order that could properly be made in this case is the Company should be wound up. The order of the Court of Appeal is therefore set aside. The appeal is allowed with costs.

WANASUNDERA, J. – I agree.

COLIN-THOMÉ, J. – I agree.

Appeal allowed.

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