RATNAM AND OTHERS
v.
JAYATILAKE

COURT OF APPEAL
UDALAGAMA, J.
CA NO. 1063/93 (F)
DC COLOMBO NO. 3443/Spl
JUNE 11, AND
JULY 01, 2002

Companies Act, No. 17 of 1982, sections 53 (1), 74, 75, 111 (2), 113, 170, 194 (2), 210, 211, 213 and 214 (1) – Conduct of affairs done in a manner oppressive – Bonus shares – Could they be included in the 5% computation? – Capacity to activate sections 210 and 211 – What is oppression? – Power of court to protect minority shareholders.

The respondents alleged, that the appellants by their conduct of the affairs of the 3rd respondent company, violated the provisions of sections 210 – 211. The trial Judge in response to this application made absolute the Order *Nisi.*

Held:

(1) In computing the 5% required under s. 214 (1) Bonus shares would be included.

(2) In view of section 211 (2) the court could with a view to remedying or preventing matters complained of or apprehended make such order as it thinks fit – by such a discretion granted to the District Court in exercising such powers, the District Court could grant remedies to prevent an injustice.

Per Udalagama, J.

"I am inclined to the view that the term oppression did include "burdensome", "harsh" and "wrongful" acts."

(3) When all the events are considered as part of a continuing story as opposed to individual events, in isolation, that on a balance of probability the affairs of the company appears to have been conducted in a manner oppressive to the respondent to this appeal, who was a minority shareholder.

APPEAL from the District Court of Colombo.

Case referred to :

1. In Re *Hammer Ltd.* – 1958 3 Allah 189.

N. D. R. Casie Chetty for appellants.

J. C. Weliamuna for respondent.

Cur. adv. vult.

July 26, 2002

UDALAGAMA, J.

This is an appeal by the 1st to 4th respondents-appellants seeking to set aside the judgment dated 12. 11. 1993 in DC Colombo case No. 3443/Spl., whereby the learned District Judge in response to an application under the provisions of sections 210 and 211 of the Companies Act, No. 17 of 1982, made the order *Nisi* dated 23. 01. 1992, absolute.

The respondent to this appeal by his petition dated 17. 01. 1992 filed action in the court below alleging that the respondents to that application by their conduct of the affairs of the company named in the caption to the plaint as the 3rd respondent, violated the provisions of the aforesaid sections 210 and 211 of the Companies Act referred to above.

The complaint of the respondent to this appeal appeared to be that the conduct of the affairs of the company was done in a manner oppressive to the latter as a Director and a shareholder. The petitioner to that application (the respondent) also sought, *inter alia*, interim relief in terms of section 213 of the Companies Act referred to above and also sought a declaration that the petitioner is a Director of the 3rd

respondent-company and that he be declared entitled to 149,500 shares of the aforesaid company and further that vehicle bearing No. 14 Sri 1516 which apparently had been taken over be returned to the petitioner to that application.

Subsequent to consideration of the submissions made by the parties, the learned District Judge by his impugned order, and as stated above, made the order *Nisi* already entered, absolute.

It was conceded that the 3rd respondent to the application in the District Court referred to above, is a limited liability company incorporated under the provisions of the Companies Act and that the respondent to this appeal was a shareholder.

When this appeal was taken up for argument on 11. 06. 2002, learned Counsel for the appellant confined his argument to 3 matters, namely, (1) the propriety of the petitioner to claim relief under the provisions of sections, 210 and 211 of the Companies Act referred to above, (2) whether the petitioner instituted the action in the court below to gain a collateral purpose, and (3) whether the activities of the company was, in fact conducted in a manner oppressive to the petitioner to that application.

Relief under the provisions of sections 210 and 211 of the Companies Act

It appears to be the contention of the learned Counsel for the appellant that the respondent to this appeal not being a member of the company as at 17. 01. 1992, was not entitled to seek remedies under the aforesaid provisions of sections 210 and 211 of the Companies Act. The learned Counsel adverted to the fact that the burden of proof as to the eligibility of the respondent to this appeal to seek relief under the aforesaid provisions lay on the respondent to this appeal and that his failure to prove that he was a shareholder in the 3rd defendant-company as at the date of the plaint warranted a dismissal of his application.

Learned Counsel further complained of the absence of documentary proof, to wit, even the production of a copy of the register of the shareholders as contemplated by the provisions of section 111 (2) of the Companies Act, which failure *prima facie* precluded him from instituting the action.

It was the finding of the learned District Judge, *vide* his impugned order, that the respondent to this application held more than 5% of the shares of the 3rd defendant-company. I am inclined to the view that in computing the 5% referred to above and required by the provisions of section 214 (1) of the Companies Act that it would also include bonus shares although the learned Counsel for the appellant contended that the issue of bonus shares to the respondent were admittedly so issued through the generosity of the 1st respondent-appellant. However, I am inclined to the view that bonus shares were those achieved by a shareholder and hence need to be counted as rightfully accrued by the latter. Such shares could not be disregarded on the basis that those were given to a party on the basis of benevolence or generosity. The learned District Judge also correctly rejected the argument based on *document* R1 filed of record, that the respondent to this appeal ceased to be a shareholder.

On a perusal of R1 it is apparent to this court that the said document, apart from not conforming to the Articles of Association and to the provisions of sections 74 and 75 of the Companies Act, is clearly incomplete. However, notwithstanding such defect I am also inclined to the view that the learned District Judge was correct in holding that the document marked C1 and filed of record which had been despatched after R1 referred to above, that the appellant had by the said C1 accepted the continued shareholding of the respondent to this application.

In any event the document marked 'A' also filed of record which pertains to the annual return of the Company having a share capital pursuant to the provisions of section 120 of the Companies Act and

document 'A1', a return as to the allotment of shares pursuant to the provisions of section 53 (1) (*a*) of the Companies Act, favour the contention made on behalf of the respondent to this appeal that the latter was, in fact a shareholder and thereby having a right to institute action under section 210 of the Companies Act referred to above.

I would also hold as correct the finding of the learned District Judge that the procedure as contemplated in Article 3 of the Articles of Association of the 3rd respondent-company and the related provisions of sections 74 (2) and 75 of the Companies Act had not been followed in respect of the transfer of shares thereby rendering nugatory the purported transfer of shares by the respondent to this appeal. The final conclusion arrived at by the learned District Judge, considering the material placed before him and as stated above appears to be that the alleged transfer of shares is unacceptable. I am inclined to the view on a balance of probabilities that the finding of the learned District Judge is reasonable, proper and justified.

The alleged resignation of the respondent to this appeal from the directorship of the 3rd respondent-company as appearing in R3A had been rejected by the learned District Judge due to the fact that the Registrar of Companies was not informed of such resignation within two weeks. This finding too could not be challenged in view of the provisions of section 194 (2) of the Companies Act.

Pursuant to the consideration of the above, I am inclined to the view on a balance of probabilities that the respondent to this appeal had, in fact the capacity to activate the provisions of sections 210 and 211 of the Companies Act to prevent oppression of the latter as a member or 3rd respondent-company.

Collateral purpose

Learned Counsel for the appellant also adverted to the fact that the respondent to this appeal instituted this action for a collateral

purpose and as such the latter's petition to the court below ought to have been rejected. It is apparent to this court that the respondent to this appeal did, in fact claim a number of reliefs as appearing from his petition to the court below dated 17. 01. 1992. It is also apparent from the legend in the heading above the caption that the latter had made the application under sections 210 and 211 of the Companies Act. The prayer to the petition specifically claimed relief under the provisions of sections 210 and 211 of the Companies Act. It is also apparent from the provisions of the Companies Act that the aforesaid sections are all under the hearing "prevention of oppression and mismanagement".

Perusing the relevant order *Nisi* issued on 12. 01. 1992, whereby the learned District Judge pursuant to submissions made by Mr. Vernon Wijetunge, QC and in accordance with the provisions of sections 210 and 211 of the Companies Act, proceeded to issue order *Nisi* granting relief as prayed for in paragraphs (අ) to (ඒ) of the petition to that application.The submission of learned Counsel for the appellant appears to be that the respondent to this appeal is entitled only to a declaration that he is entitled to 149,500 shares and the car bearing No. 14 Sri 1516. There also appears to be the submission of the learned Counsel for the appellant that the petitioner was seeking to use the process of court for a collateral purpose by his application to the court below. However, I am inclined to the view that the opportunity granted to tender objections against the order *Nisi* been made absolute was precisely for the purpose of enabling court to entertain objections including the type of objections made by learned Counsel for the appellant, before this court.

If the respondent to this appeal did, in fact have an ulterior motive, the forum to place those facts in the first instance was the District Court. Perusing the impugned order, no reference is made to the particular objection of the appellant that the respondent to this appeal was harbouring an ulterior motive, nor does it appear to be that the appellant did in fact canvass that objection in the court below.

In any event, I am inclined to the view that the reliefs given in the order *Nisi* are confirmed when the said order *Nisi* is made absolute and that the appellant is not entitled to raise such objections in this court at this stage. Besides, *vide* provisions of section 211 (2) of the Companies Act, the court could with a view to remedying or preventing the matters complained of or apprehended, make such order as it thinks fit.

I am of the view that by such a discretion granted to the District Court in exercising such powers the District Court could grant remedies to prevent an injustice. I would concur with the observation made in *H. R. Hammer Ltd.,*[1] which held, under the provisions of the English Companies Act, that provisions made to enable a court to pronounce an appropriate order to protect minority shareholders in similar circumstances was proper. Besides, the powers conferred on courts *vide* provisions of section 216 of the Companies Act in respect of applications under sections 210 and 211 would warrant the District Court granting relief as prayed for.

In the attendant circumstances, I would reject the argument of learned Counsel for the appellant that the respondent to this appeal did abuse the process of Court.

Oppression

Lastly, on the question of oppression, the learned District Judge had interpreted the term "oppression" on the authorities tendered by the respondent to this appeal (page 103). I am inclined to the view that the term oppression did include "burdensome", "harsh" and "wrongful" acts (In re. *H. R. Hammer Ltd. (supra)*). I would also hold as correct the finding of fact made by the learned District Judge in respect of the instances referred to by the latter in his impugned order in regard to the purported resignation notwithstanding the understanding to withdraw the letter of resignation, the unilateral decision of the appellant to not hold a meeting of Directors and shareholders, the

unauthorized transfer of shares and the perverse nature of the requirements of the respondent to this appeal to return forthwith the car issued admittedly for the use of the respondent to this appeal. Considering the events of the company pertaining to this application as unfolded by the learned District Judge, I would venture to state that when all the events are considered as part of the continuing story as opposed to an individual event, in isolation, that on a balance of probability the affairs of the company appears to have been conducted in a manner oppressive to the respondent to this appeal, who admittedly was a minority shareholder as correctly held by the learned District Judge.

I will also reject the submissions of the learned Counsel for the appellant that the remedy available to the respondent to this appeal was provided for by the provisions of section 113 of the Companies Act. This averment too while not having been taken up before the learned District Judge, in any event ought to be rejected as provisions of section 113 referred to above entitles court to only rectify the register of members of the company. In any event, for the reasons as stated above the respondent to this appeal was not precluded from seeking relief under the provisions of sections 210 and 211, as he did by his petition to the court below.

In all the attendant circumstances, I would dismissed this appeal with costs.

Appeal dismissed.