[IN THE PRIVY COUNCIL]

1951 *Present:* **Lord Porter, Lord Normand, Lord Oaksey and Lord Radcliffe**

SRI LANKA OMNIBUS CO., LTD., Appellant,
and L. A. PERERA, Respondent

PRIVY COUNCIL APPEALS NOS. 33-39 OF 1950

S. C. 376—382—D. C. Colombo, 15,925-15,931

Contract—Measure of damages for breach—Contract to allot shares in Company—Order for specific performance—Compensation claimable in addition—Omnibus Service Licensing Ordinance, No. 47 of 1942—Schedule I—Payment of compensation.

The party complaining of a breach of contract is not entitled to be put in a better position than he would have enjoyed if the contract had performed according to its terms.

In a case of breach of contract by a Company to allot shares the aggrieved party's position is fully restored when the shares have been allotted to him under an order for specific performance and he has received the equivalent of the dividends he would have received if the contract had been duly performed, with interest on the dividends until payment.

Obiter : There is no warrant in the Omnibus Service Licensing Ordinance No. 47 of 1942 for the proposition that operators of routes before the enactment of that Ordinance were entitled to expect to get a living out of the compensation for which the Ordinance provides, or out of shares which they might choose to take instead of claiming compensation.

APPEAL from a judgment of the Supreme Court.

L. M. D de Silva, K.C., with *R. K. Handoo*, for the defendant appellant.

N. R. Fox Andrews, K.C., with *Stephen Chapman*, for the plaintiff respondent.

Cur. adv. vult.

December 5, 1951. [*Delivered by* LORD NORMAND]—

In these consolidated appeals the sole question submitted for determination by the Board is one of damages for breach of contract, in particular what is the correct method of assessing damages in an action in which the Court, having found that the defendant company was in breach of a contract to allot shares to the plaintiff, had granted an order for specific performance of that contract.

The appeal taken by defendant and appellant company against Mr. L. A. Perera as respondent has been selected as the leading appeal and the Board's decision upon it will govern the appeals consolidated with it.

The appellant company was incorporated on the 24th November, 1942, and it was brought into being for the purpose of operating an exclusive road service under the Omnibus Service Licensing Ordinance, No. 47 of 1942, on the Colombo to Kandy road in the Island of Ceylon, though under the objects clause of its Memorandum of Association it

was empowered to apply for licences to operate on other routes. Before that Ordinance was enacted owners of omnibuses obtained route licences, which frequently overlapped, so that several licensees were entitled to ply along the same route. This, as is stated in the judgment of the Supreme Court, sometimes resulted in unhealthy rivalry and competition between the licensees and even led to breaches of the peace and to the commission of serious offences. It was to remedy this mischief that the Ordinance of 1942 was enacted. It provided (section 2 (1)) that no omnibus should on or after the 1st of January, 1943, be used on any highway for the conveyance of passengers for fee or reward, except under the authority of a road service licence issued by the Commissioner of Motor Transport, and (section 7 (1)) that, subject to a proviso and to an exception which are not material, the issue of road service licences should be so regulated by the Commissioner as to secure that different persons were not authorised to provide regular omnibus services on the same section of any highway. By the First Schedule to the Ordinance applications made by two or more persons for road service licences to come into force on or before 1st January, 1943, in respect of the same route or of routes which were substantially the same were assigned an order of preference which the commissioner was bound to observe in deciding which application should be granted. First in this order of preference was an application by a company or partnership comprising the holders of all the licences for the route in force under the Ordinance of 1938. Second in the order of preference was an application by a company or partnership comprising the holders of the majority of such licences. There were further priorities not material to this case. The Schedule, as a condition of the grant of the licence, required payment of compensation by the applicant to other holders of licences for the route under the Ordinance of 1938, unless they had a pecuniary interest or share in the business proposed to be carried on by the applicant.

On the Colombo route and its subsidiaries the largest operators and licence holders were the M.J. bus service of which the proprietor was M. Jayasena, the B.J. bus service of which the proprietor was B. J. Fernando and the Little Service Bus Company of which the proprietors were W. K. Fernando and P. Don Francis Alwis. These four named persons in association were in a position to claim that they were within the second priority as defined by the Schedule and it was they who formed the appellant company and who were the subscribers to the Memorandum of Association. They were also the directors of the company, and in return for the omnibuses and licences which they transferred to the company they received 5,850 shares of Rs. 100 each paid up as to 90 per cent., making a total subscribed capital of Rs. 526,500 out of an authorised capital of Rs. 1,000,000. In addition they took up 50 shares paid up as to 90 per cent., making a further sum of Rs. 4,500. There remained available for subscription among the other existing operators under old licences for the Kandy-Colombo route 4,100 shares of Rs. 100 each.

After the company was incorporated negotiations took place between the company and those other holders of licences for the route under the Ordinance of 1938, among whom were the respondent Perera and the respondents in the other six consolidated appeals. It is not necessary

to consider the course of these negotiations, for it has been determined by concurrent findings of the District Court and the Supreme Court, acquiesced in by the appellant company, that the company agreed to allot to the respondent Perera shares to the value of Rs. 5,000, that the appellant company had failed to perform its obligation and that the respondents was entitled to damages from 1st January, 1943, for such failure and breach of contract. By the orders of the Courts below the company was required to allot to the respondent shares to the value of Rs. 5,000.

On the sole question now in dispute, the proper measure of damages, the respondent's plaint contained the single statement that by reason of the breach he had suffered loss and damages to the value of Rs. 750 *per mensem*, and it is necessary to observe that there was no allegation that the value of the shares or the quantum of profit or the rate of dividend had been reduced by fraud on the part of the directors or by any unlawfulness or irregularity in the conduct of the company's affairs. Issues were framed, and on damages the only issue was to what damages was the plaintiff entitled for failure to allot up to the date of allotment. In the record of the evidence a note was inserted by the District Judge the importance of which requires that it should be quoted. It runs, " I intimate to Mr. Wickremenayake (the respondent's counsel) that the assessment of his damages at Rs. 750 a month would be on a false basis as that would not be the earning capacity of a bus after the route licence was given to the defendant company. He therefore states he is prepared to restrict his claim to such amount as he would be entitled to for the shares and profits on the figures in the balance sheet P 11. This will be the basis of assessment of damages in all the cases. Mr. Choksy (the appellant company's counsel) states that in view of this statement he does not want to cross-examine any of the plaintiffs on the question of damages ". This note is not in all respects as clear as might be desired. But it seems to the Board beyond doubt that the respondent's counsel admitted that for the purpose of assessing damages the figures as they stood in the balance sheet were correct and that the appellant's counsel thereafter conducted his case on the footing that the balance sheet would not be questioned. Moreover it was the respondent who produced the balance sheet, which covers the period January, 1943, to January, 1944, and he did so without making any comment or criticism, remarking only that the expenses were Rs. 20,000 less than the receipts as they approximately were. There was evidence that the appellant company had for the first year of the operations declared a dividend of one per cent.

The District Judge awarded as damages a sum equal to 50 per cent. per annum on Rs. 5,000, the nominal value of the shares which ought to have been allotted, from 18th January, 1943, to the date of allotment. In the High Court the respondent's counsel admitted that this award could not be supported and their Lordships are therefore relieved from the duty of considering it further. The Supreme Court assessed the damages at a sum equal to 20 per cent. per annum of the nominal value of the shares from 18th January, 1943, to the date of allotment.

The contention of the appellant company is that the respondent having obtained an order for specific performance of the obligation to

allot the shares, was not entitled to an award of damages of more than the equivalent of the dividends at the rates declared by the company between the date when the shares should have been allotted and the date of actual allotment, with interest on the dividends until payment. Their Lordships are of opinion that this is the correct measure of damages. The party complaining of a breach of contract is not entitled to be put in a better position than he would have enjoyed if the contract had been performed according to its terms. When the contract is a contract to allot shares, the aggrieved party's position is fully restored when the shares have been allotted to him under an order for specific performance and he has received the equivalent of the dividends he would have received if the contract had been duly performed, with interest during non-payment. The Supreme Court recognised that that was in general the principle to be applied, but it found that the balance sheet contained inaccuracies which ought to be rectified before damages were computed. In particular it disallowed an item of Rs. 124,179 for depreciation, on the ground that the company had entered into an agreement with branch managers, who were themselves directors, by which each branch manager should take 90 per cent. of the gross takings of his branch, out of which he was to pay various outgoings including the cost of replacing omnibuses as they became old or unserviceable. This sum of Rs. 124,179 the Supreme Court added to the profits as brought out in the balance sheet, and dealt with the whole balance sheet profits thus swelled as a sum which ought to have been distributed as dividend. The Court then calculated that on this basis a dividend at the rate of 20 per cent. ought to have been distributed among shareholders including the respondent. The Board has no hesitation in rejecting the considerations which moved the Supreme Court in making the award. It is a fatal objection that the trial had been conducted on the footing that the balance sheet figures were correct and it was not open to the Supreme Court to readjust them in this manner. It is also a fatal objection that the issue whether the sum of Rs. 124,179 was properly charged for depreciation was never raised in the pleadings, in the issues or in the evidence. It is a question of accountancy whether the company did not correctly set aside a reserve for depreciation of the omnibuses which were in fact its property, though the branch managers had become personally bound to replace the amnibuses out of their portion of the gross takings. There is no accountancy evidence because this question was never in issue. Finally it is not correct to assume that the profits shown in the balance sheet or an adjusted balance sheet would have been or ought to have been wholly distributed as dividends.

The respondent's counsel did not argue the appeal on the grounds on which the Supreme Court had proceeded. He maintained that the Supreme Court's award could be justified on the ground that it represented the loss which would reasonably be in contemplation of the parties when the contract was made as the probable result of the breach of it. He asserted that an operator of a route before the enactment of the Ordinance No. 47 of 1942 became entitled, either by way of compensation or by an allotment of shares of the company applying for a licence under that Ordinance, to enjoy, or at least to expect to enjoy, a living in return

for the property and rights of which he was deprived, and that he was also entitled to expect that the business of the company would be conducted in an ordinary or normal manner, and so that this expectation of obtaining a living would not be defeated. He complained of the arrangement by which the branch managers retained 90 per cent. of the gross takings of their branch, and of resolutions by which the company became a private company with restrictions on members' rights to transfer shares, and a limitation of the number of members. All these, he said, were departures from the normal conduct of the company's affairs as contemplated when the contract to allot shares was made and had disappointed the respondent's expectation of obtaining a living from his shareholding.

Their Lordships would first observe that these contentions stray into regions not less far removed from the issues properly raised in this case than the considerations which weighed with the Supreme Court. It is accordingly not necessary to consider them in detail. It may, however, be said that there is no warrant in the Ordinance for the proposition that operators were entitled to expect to get a living out of the compensation for which the Ordinance provides, or out of shares which they might choose to take instead of claiming compensation. It would be strange indeed if the respondent who had one omnibus and used, according to his own evidence, to make Rs. 200 or Rs. 300 a month less expenses should expect to make a living out of compensation for the loss of his business. The failure of the supposed expectation of obtaining a living is a conception too vague and desultory to be the foundation of a claim for damages. Further a shareholder must take a company in which he invests his money with all its legal rights and powers and he will not be heard to complain that his expectations have been defeated by the lawful and regular exercise of its powers. Now counsel admitted that it was not competent for him in this case to impugn anything that was done in the conduct of the company's business as in excess of power or otherwise unlawful or oppressive and his complaint that the company's affairs were carried on in an abnormal manner, besides being lacking in precision, is wholly irrelevant. This new presentation of the case for the respondent therefore fails to justify any departure from the ordinary principles of assessing compensation.

Their Lordships will humbly advise His Majesty that the consolidated appeals should be allowed, and that for the Order of the Supreme Court affirming the judgment of the District Court subject to the modification that for the figure 50 the figure 20 should be substituted therein, there should be substituted an order affirming the judgment of the District Court subject to the modification that the defendant company shall pay to the plaintiff as damages a sum or sums equivalent to the dividend or dvidends at the rate or rates declared between 18th January, 1943, and the date of allotment, together with interest on such sum or such sums respectively from the date or dates when the declared dividend or dividends became payable till the date of payment of such sum or such sums. The respondent will pay the costs of the appeal.

Appeals allowed.