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GEORGE JOHN PERISTIANY
v.
R.J. ARCHONTIDES LIMITED

[VASSILIADES, P., TRIANTAFYLLIDES, HADJIANASTASSIOU, JJ.]

GEORGE JOHN PERISTIANY,

Appellant (Applicant),

v.

R. J. ARCHONTIDES LIMITED,

Respondents (Respondents).

(Civil Appeal No. 4583).

Company Law—Investigation of the affairs of a Company by an inspector—Appeal against dismissal of an application under section 159 (a) *of the Companies Law, Cap.* 113 *and Rule* 6 (d) *of the Companies Rules for the appointment of inspector to investigate the affairs of Respondent Company—Allegations of fraud and deceit against the Directors of the Company—Appellant's failure to prove such allegations and to make out a case to require Court to declare that the affairs of the Company had to be investigated by an inspector—Trial Court rightly exercised its discretion to dismiss application.*

Costs—Discretion—Discretion of trial Court in awarding costs—Nothing to suggest that trial Court acted wrongly or on any wrong principle in awarding costs against Applicant.

This was an appeal against the judgment of the District Court of Limassol dismissing an application for a declaration that the affairs of the Respondent Company ought to have been investigated by an Inspector, under the provisions of s. 159 (a) of the Companies Law, Cap. 113 and Rule 6 (d) of the Companies Rules.

In an affidavit sworn by applicant in support of the application it was *inter alia* alleged as follows :

(a) that since the Company has been represented as operating at a loss since 1951 and is continuing to incur further debts, the losses have either absorbed of threaten to absorb the paid up capital an investigation of its affairs was required.

(b) that there have been suspicious dealings in the funds, assets and property of the Company the true nature of which has never been disclosed by the Directors of the Company to the members; but instead they have been producing annually

balance-sheets which were false and have concealed the true nature of this suspicious dealings and in order to deceive the shareholders concerning the insolvency of the Company and to prevent any action being taken against those responsible and make good the loss of the Company.

(c) that the prolongation of the life of the Company only means increase of its liabilities and insolvency.

The respondent company filed an opposition together with an affidavit sworn by one of the Directors who is also the Technical Manager of the Company wherein the allegations of fraud and deceit attributed by applicant to the existing Directors of the company were rejected as being totally unfounded. The affidavit further alleges that applicant was fully aware of the losses and the financial condition and actions and deeds of the Managing Director of the Company Mr. Paris Archontides. They were never objected to by the Applicant until after the Company ceased to market his brandy in 1960. Moreover, the Company never refused to give the shareholders any information regarding its accounts, assets and liabilities and it is still ready to place all its accounts for audit by any competent accountant or auditor the Applicant may wish to appoint but always at the expense of the applicant.

The main argument of appellant's counsel before the Court of Appeal was that the trial Court failed to appreciate fully the purpose of the order sought under section 159 of Cap. 113; and that the reasons given in the judgment cannot be valid reasons, supporting the finding that there was misconduct on the part of the Directors, and a failure on their part to give all the information with respect to the affairs of the company. Counsel further contended that the Court wrongly exercised its *discretion no to order an investigation of the affairs of the* company.

Held, (I) *adopting and applying the reasoning behind the case in Re A.B.C. Coupler and Engineering Co. Ltd.,* [1962] 1 *W.L.R.* 1236 :

(I) In our opinion the Appellant who has levelled such grave charges like fraud and deceit against the Directors of the Company, fully knowing that the Director who had committed such fraudulent acts was forced to resign more than four years before the institution of the present proceedings, has not only failed to adduce evidence to show sufficient proof of those charges contained in his affidavit, but on the opposite the evidence

adduced on his behalf proved affirmatively, that there was neither fraud nor deceit or misconduct on the part of the present Directors; they had done everything possible to protect the interest of the Company and regularly made available all information with regard to the affairs of the Company, to the annual general meeting of the shareholders. In the circumstances we are of the view that the Appellant has failed to adduce evidence of sufficient proof of these charges and as he has failed to make out a case to require the Court to declare that the affairs of the Company had to be investigated by an inspector, we are of the opinion, that the trial Court rightly exercised its discretion to dismiss the Application; and we have reached the conclusion, in the circumstances, and on those grounds to dismiss the appeal.

(2) In our opinion, the trial Court in view of the evidence adduced and all the other material before them, rightly and correctly approached the case and the purpose of the order sought by the Appellant. It is true, of course, that there was misconduct on the part of Paris Archontides whilst acting as managing director of the Company; but there was nothing on record to show that the rest of the Directors were in any way connected with the misconduct of the managing director; on the opposite, as soon as they discovered his fraud they forced him to resign, treating the whole matter as an internal affair of the Company, apparently, in order to avoid adverse publicity and aggravate the position of their ex-servant.

Held, (II) *with regard to costs :*

We see no reason for interfering with the discretion of the trial Court as we have not heard argument which suggested that the Court had acted wrongly or that it acted on any wrong principle. *Vide Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732 at p. 811; *Chrysoulla Eleftheriou* v. *Dora N. Rousou and another,* 23 C.L.R. 191; also *G.E. Glykys* v. *J. S. Ioannides,* 24 C.L.R. 220 at p. 222. C/F *Re Newman and Howard Ltd.,* [1961] 2 All E.R. 495.

Appeal dismissed with costs.

Observation:

We would like to observe that it was not part of the business of a paid up shareholder to bring an application for declaration that the affairs of the Company required investigation by an inspector simply because he wanted to bring to the Court's attention some state of the Company's affairs, which

he considered to be open to criticism in the way in which the Company's business is conducted and to suggest to the Court that the affairs of the Company had to be investigated with a view of collecting further information in order to enable the Applicant at a later stage to file a petition for the winding-up of the Company. C/f Re *Othery Construction Ltd.*, [1966] 1 All E.R. 145.

Cases referred to :

Re A.B.C. Coupler and Engineering Co. Ltd. [1962] 1 W.L.R. 1236 at p. 1243;

Re St. David's Gold Mining Co. Ltd. (1866) 14 L.T. 539;

Re South Staffordshire Dramways Co. (1894) 1 Mans. 292;

Re Ilfracombe Permanent Mutual Benefit Building Society [1901] 1 Ch. 102;

Re S. A. Hawken Ltd. [1950] 2 All E.R. 408;

Re Davis Investments East Ham Ltd., [1961] 3 All E.R. 926;

Re Othery Construction Ltd., [1966] 1 All E.R. 145;

Donald Campbell Co. Ltd. v. *Pollack* [1927] A.C. 732 at p. 811;

Chrysoulla Eleftheriou v. *Dora N. Roussou and another* 23 C.L.R. 191;

G. E. Glykys v. *J. S. Ioannides* 24 C.L.R. 220 at p. 222.

Re Newman and Howard Ltd. [1961] 2 All E.R. 495.

Appeal.

Appeal against the judgment of the District Court of Limassol (Malachtos and Papadopoullos, D.J.) dated the 31st May, 1966 (Application No. 4/64) dismissing an application for a declaration that the affairs of the Respondent Company ought to have been investigated by an Inspector, under the provisions of section 159 (*a*) of the Companies Law Cap. 113 and Rule 6 (*d*) of the Companies Rules.

St. G. McBride, for the appellant.

Sir P. Cacoyannis, for the respondent.

Cur. adv. vult.

VASSILIADES, P. : The Judgment of the Court will be delivered by Mr. Justice HadjiAnastassiou.

HADJIANASTASSIOU, J.: The Appellant (Applicant) filed an application dated the 29th June, 1964, before the District Court of Limassol seeking a declaration that the affairs of the Respondent Company ought to have been investigated by an Inspector, under the provisions of section 159 (*a*) of the Companies Law Cap. 113, and of Rule 6 (*d*) of the Companies Rules. The Full District Court of Limassol by an Order dated 31st May, 1966, dismissed the Application with costs, and the Applicant now appeals against that decision on several grounds.

The facts as briefly as possible are as follows:

The Respondent Company, R.J. Archontides Ltd., is a private company and was incorporated in Cyprus on the 3rd February, 1944, under the Companies (Limited Liability) Laws 1922-1940. The nominal capital of the company was £50,000 divided into 5,000 shares of £10 each, of which 200 shares paid up in full were held by the Appellant and the rest by another nine persons, Mr. N. P. Solomonides being the biggest single shareholder. The amount of capital paid up or credited as paid up is £25,000. The Company has five Directors but only two of them receive remuneration.

The objects of the Company as set out in its Memorandum of Association are, inter alia (1) to acquire, undertake and take over purchase or otherwise as a going concern the whole of the undertaking and business now carried on by Mr. Renos J. Archontides in Cyprus together with plants, machinery, furniture, barrels, vats, bottles, cask, stock in trade and any other movable property etc. etc. (2) to carry on all or any of the business of wine and spirit exporters and importers, vine growers, manufacturers, merchants, shippers, blenders, bottlers and brokers of wines, spirits ....and other objects".

The Company commenced business immediately on its incorporation and Mr. Paris Archontides became the first Managing Director with a salary of £1,200 per annum as from February, 1944 till the 13th June, 1960, when he resigned and was replaced by Mr. N. Solomonides, who refused to accept a remuneration for his services.

In the meantime the Applicant who was also a distiller and trader in brandies had entered into an agreement with the Managing Director of the Company and as a result of that agreement the Respondent Company was marketing the brandy of the Applicant in Cyprus. The said agreement was terminated

on the 30th June, 1960 with effect as from the 17th May, 1960. (Vide affidavit of Respondent at p. 24 of the record).

Some time in May, 1960, it was ascertained by the Directors that Mr. Paris Archontides had issued seven or eight accommodation bills, in his capacity as Managing Director of the Company for the sum of about £2,000; he negotiated those bills on the part of the Company and took the money for his personal needs.

The Applicant filed in the District Court of Limassol a petition No. 1/61 on the 22nd March, 1961, for the winding up of the Company based substantially on the same grounds as in Applicant's present Application. The said petition was withdrawn and was dismissed on the 23rd March, 1964. Applicant reserved his rights to file a new petition; but instead Applicant instituted the present proceedings under section 159 (*a*) of the Companies Law, Cap. 113.

On the 29th June, 1964, the Appicant swore a long affidavit in support of his Application alleging, *inter alia*,

(a) that since the Company has been represented as operating at a loss since 1951 and is continuing to incur further debts, the losses have either absorbed or threaten to absorb the paid up capital an investigation of its affairs was required.

(b) that there have been suspicious dealings in the funds, assets and property of the Company the true nature of which has never been disclosed by the Directors of the Company to the members; but instead they have been producing annually balance-sheets which were false and have concealed the true nature of this suspicious dealings and in order to deceive the shareholders concerning the insolvency of the Company and to prevent any action being taken against those responsible and make good the loss of the Company.

(c) that the prolongation of the life of the Company only means increase of its liabilities and insolvency.

The Respondent Company filed an Opposition dated the 30th September, 1964, together with an affidavit sworn by Mr. Solon J. Archontides, a Director and Technical Manager of the Company, rejecting the allegations of fraud and deceit, attributed by the Applicant to the existing Directors of the

Company as being totally unfounded. He admitted, however, that the state of affairs of the Company was such that if the Company would wound up the realisable assets would not be sufficient to cover its debts due mostly to Mr. N. Solomonides and to certain banks. The amounts due to the banks were under the personal guarantee of certain of the Directors of the Company. The affidavit further alleges at p. 25, paragraph 6, of the record "the Applicant was to my best knowledge and belief fully aware of the losses and the financial condition and actions and deeds of the Managing Director of the Company Mr. Paris Archontides. They were never objected to by the Applicant until after the Company ceased to market his brandy in 1960. Moreover, the Company never refused to give the share-holders any information rogarding its accounts, assets and liabilities and it is still ready to place all its accounts for audit by any competent accountant or auditor the Applicant may wish to appoint but always at the expense of the Applicant".

It is clear that the affidavit of the petitioner alleges insolvency and that there is no prospect of there being anything available in a winding-up for the share-holders; this fact has been also conceded by Mr. Solon Archontides on behalf of the Company.

Socrates Anastassiou, witness 2 for the Applicant, who is the accountant of the Company, said in evidence that the books of the Company contained all information relating to the accounts of Paris Archontides, and of every item relating to revenue and expenditure of the Company.

Theseas Metaxas, the auditor of the Company stated, *inter alia*, that the debit balance of the profit and loss account of the Company up to the year 1960 was £15,130.680 mils and up to 31st December, 1964 £26,848.471 mils. He agreed that the accommodation bills issued by Mr. P. Archontides, although negotiated on the part of the Company had not featured in the accounts of the Company; though after May, 1960 the Board of Directors of the Company after they became aware of the existence of such bills, they decided that it was to the benefit of the Company to pay the value of those bills. Having decided, so they debited the personal account of Mr. P. Archontides in the books of the Company with the amount representing the face value of those bills. In cross-examination the witness said that the balance-sheet, profit and loss account and the adjustments show all the information required with respect to the affairs of the Company, which its members might reasonably expect to receive. He went on to say that

there was nothing concealed from the Company's members; and the liability of the Company to pay the amount of the accommodation bills by instalments appeared in the accounts placed before the shareholders at the general meeting.

It is, at this stage, convenient to refer to section 159 of the Companies Law under which the Appellant (Applicant) petitioned the Court for relief. It is, so far as relevant, as follows :

"159. Without prejudice to his powers under section 158, the Governor–

(a) shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Governor (now the Council of Ministers) directs, if–

(i) ....

(ii) the Court by order, declares that its affairs ought to be investigated by an inspector appointed by the Governor (now the Council of Ministers);".

The main argument of Appellant's counsel before us was that the trial Court failed to appreciate fully the purpose of the order sought under section 159 of Cap. 113; and that the reasons given in the judgment cannot be valid reasons, supporting the finding that there was misconduct on the part of the Directors, and a failure on their part to give all the information with respect to the affairs of the Company. Counsel further contended that the Court wrongly exercised its discretion not to order an investigation of the affairs of the Company.

In our opinion, the trial Court in view of the evidence adduced and all the other material before them, rightly and correctly approached the case and the purpose of the order sought by the Appellant. It is true, of course, that there was misconduct on the part of Paris Archontides whilst acting as managing director of the Company; but there was nothing on record to show that the rest of the Directors were in any way connected with the misconduct of the managing director; on the opposite, as soon as they discovered his fraud they forced him to resign, treating the whole matter as an internal affair of the Company, apparently, in order to avoid adverse publicity and aggravate the position of their ex-servant.

Going through the record very carefully we are satisfied that the Company had held the general meeting of its members

every year and that the Directors presented the accounts for each financial year with all the information required in respect of the affairs of the Company; furthermore it is clear that the Company has never refused to supply information to the Appellant, and has shown its willingness to co-operate with the Appellant, by affording to him every facility, placing at his disposal all its accounts for audit by a competent accountant or auditor of his own choice.

Mr. Justice Buckley delivering the judgment of the Court (Chancery Division) in the case of Re *A.B.C. Coupler and Engineering Co. Ltd.* [1962], 1 W.L.R. 1236 and after reviewing the authorities of Re *St. David's Gold Mining Co. Ltd.* (1866) 14 L.T. 539, Re *South Staffordshire Dramways Co.*, (1894) 1 Mans. 292, Re *Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, Re *S.A. Hawken Ltd.*, [1950] 2 All E.R. 408, Re *Davis Investments (East Ham) Ltd.*, [1961] 3 All E.R. 926, had this, *inter alia*, to say at p. 1243 : "The reconciliation, in my judgment, is that where grave charges are levelled against individuals in a winding-up petition, or, it may be, where the case is one of complexity turning upon the conduct of persons who are more or less in the relationship of partners in a company, the Court will not, in the exercise of its discretionary jurisdiction, be satisfied merely with such *prima facie* evidence as the statutory affidavit affords but will require the petitioner to substantiate his case more fully. In other words, to follow the language of Danckwerts L.J. in such cases the Court requires the petitioner to make out his case. That does not mean that he must prove fraud or misconduct or everything that he would have to prove in a case for dissolution of a partnership, but he must prove facts from which the Court can infer that there is sufficient suspicion of fraud or misconduct, or sufficient ground for thinking that the parties have reached a stage at which they cannot any longer continue to be associated in business with confidence in one another, ...I do not say that there may not be some sort of case in which the only evidence available to the petitioner is of a hearsay character. Perhaps in such a case the Court would be satisfied with hearsay evidence, but, where grave charges are involved the Court should, if practicable, have the advantage of hearing evidence upon which there can be effective cross-examination, the evidence of witnesses who have first-hand knowledge of the matters as to which they are giving evidence".

Though this case is reported as a winding-up case under section 169 (3) of the Companies Act 1948, nevertheless, in

our view the quality of evidence required is the same under section 165, also, which is similar to our Section 159, of the Companies Law (see Annual Practice 1966 1999/88).

As we are in agreement with the reasoning behind this Case we will adopt and apply it in the case before us. In our opinion the Appellant who has levelled such grave charges like fraud and deceit against the Directors of the Company, fully knowing that the Director who had committed such fraudulent acts was forced to resign more than four years before the institution of the present proceedings, has not only failed to adduce evidence to show sufficient proof of those charges contained in his affidavit, but on the opposite the evidence adduced on his behalf proved affirmatively that there was neither fraud nor deceit or misconduct on the part of the present Directors; they had done everything possible to protect the interest of the Company and regularly made available all information with regard to the affairs of the Company, to the annual general meeting of the shareholders. In the circumstances we are of the view that the Appellant has failed to adduce evidence of sufficient proof of these charges and as he has failed to make out a case to require the Court to declare that the affairs of the Company had to be investigated by an inspector, we are of the opinion, that the trial Court rightly exercised its discretion to dismiss the Application; and we have reached the conclusion, in the circumstances, and on those grounds to dismiss the appeal.

We would like further to observe that it was not part of the business of a paid up shareholder to bring an application for declaration that the affairs of the Company required investigation by an inspector simply because he wanted to bring to the Court's attention some state of the Company's affairs, which he considered to be open to criticism in the way in which the Company's business is conducted and to suggest to the Court that the affairs of the Company had to be investigated with a view of collecting further information in order to enable the Applicant at a later stage to file a petition for the winding-up of the Company. C/F Re *Othery Construction Ltd.*, (1966) 1 All E.R. 145.

Finally it was argued by counsel for the Appellant that the Court had not properly exercised its discretion in granting costs against the Appellant (Applicant). We see no reason for interfering with the discretion of the trial Court as we have

not heard argument which suggested that the Court had acted wrongly or that it acted on any wrong principle. Vide *Donald Campbell Co. Ltd.* v. *Pollak* [1927] A.C. 732 at p. 811; *Chrysoulla Eleftheriou* v. *Dora N. Roussou and Another* 23 C.L.R. 191; also *G.E.Glykys* v. *J. S. Ioannides* 24 C.L.R. 220 at p. 222. C/F Re *Newman and Howard Ltd.* [1961] 2 All E.R. 495.

The appeal should, accordingly, in our opinion be dismissed with costs.

Appeal dismissed with costs.