29, 1951

Appeals Nos. 33–39 of 1950.

In the Privy Council

31365

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

UNIVERSITY OF LONDON
W.C.1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE SRI LANKA OMNIBUS CO. LTD. . . . . . . (Defendant) *Appellant*

AND

L. A. PERERA . . . . . (Plaintiff) *Respondent*

(No. 33 of 1950)

AND BETWEEN

THE SAME . . . . . . (Defendant) *Appellant*

and

H. M. J. BANDARA . . . . (Plaintiff) *Respondent*

(No. 34 of 1950)

AND BETWEEN

THE SAME . . . . . . (Defendant) *Appellant*

and

W. D. R. GUNASEKERA . . . (Plaintiff) *Respondent*

(No. 35 of 1950)

AND BETWEEN

THE SAME . . . . . . (Defendant) *Appellant*

and

Mrs. ALICE WIJERATNE . . . (Plaintiff) *Respondent*

(No. 36 of 1950)

AND BETWEEN

THE SAME . . . . . . (Defendant) *Appellant*

and

W. ARNOLIS APPUHAMY . . . (Plaintiff) *Respondent*

(No. 37 of 1950)

AND BETWEEN

THE SAME . . . . . . (Defendant) *Appellant*

and

G. D. E. MALAWANA . . . . (Plaintiff) *Respondent*

(No. 38 of 1950)

INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1

20845

AND BETWEEN

THE SAME . . . . . (Defendant) *Appellant*

and

P. DON PABILIS APPUHAMY . (Plaintiff) *Respondent*

(No. 39 of 1950)

(Consolidated Appeals)

RECORD.

Marginal references are to the first of these Appeals.

Case for the Appellant

p. 84.

1. These consolidated appeals are from a decree of the Supreme Court of the Island of Ceylon, dated the 9th July, 1948, varying decrees of the District Court of Colombo, dated the 19th August, 1946, whereby, in separate actions instituted against the Appellant (hereinafter called "the Company" or "the Appellant Company") by each of the Respondents hereto, for specific performance of an alleged agreement to allot shares in the Company and for damages for breach of the said agreement, it was ordered that the Company do allot to each of the Plaintiffs shares in the Company to the extent of a specified sum and, further, that the Company do pay to each Plaintiff damages at the rate of 50 per cent. per annum on the said sum from the 2nd February, 1943, up to the date of the allotment of the said shares.

pp. 73–74.

pp. 73–74.

p. 84.

Varying the decree of the District Court as to damages, the Supreme Court reduced the said rate of 50 per cent. to 20 per cent. per annum.

2. The main question that now arises is concerned with the propriety and legality of the said award of damages against the Company.

3. The preliminary facts leading up to the incorporation of the Appellant Company were thus stated in the Supreme Court by Nagalingam, J., in his Judgment in these appeals, dated the 9th July, 1948:—

p. 78, ll. 13–17.

> "Prior to the dates material to this action, individual owners were entitled to ply omnibuses along routes in respect of which they were duly licensed. This resulted in unhealthy rivalry and competition between various owners and often led to breaches of the peace and sometimes to the commission of grave offences affecting both persons and property.

p. 78, ll. 17–24.

> "To remedy this unsatisfactory state of affairs, the Omnibus Service Licensing Ordinance No. 47 of 1942 was enacted, whereunder a single concern consisting either of a company or of a partnership or of an individual was granted the exclusive road service licence to operate on a particular route. The determination of the particular company, partnership or individual to be licensed was governed by a certain order of priority specified in the First Schedule to the Ordinance."

4. Continuing his narrative, the learned Supreme Court Judge (Nagalingam, J.) said :—

" . . . Where the exclusive road service licence was issued to a concern or individual, no other person or persons could operate an omnibus service on that route, thus eliminating even other persons who had previously been wont to operate on the route, unless, of course, such persons became shareholders in the company or partners in the partnership. Relief, however, was provided for any person or persons who had prior to the issue of the exclusive road service licence operated on the route and who had not merged his interests either in the company or partnership by declaring him entitled to compensation against the concern or individual to whom the exclusive road service licence was issued for the loss of rights. p. 78, ll. 24–34.

10

" . . . In the issue of the exclusive road service licence, the topmost priority was given to a company or partnership which comprised all the operators on the particular route. Next in order of priority came a company or partnership which had within its fold the majority of the operators on the route, the majority being determined not by the number of individuals but by the number of route licences held. p. 78, ll. 34–40.

20

" . . . it will be seen that it was of the utmost importance that when a company or partnership applied for the exclusive road service licence it should have been able to make out to the satisfaction of the licensing authority that at least it held the majority of licences on that route. In order to ensure this majority companies and partnerships went all out to secure the co-operation of as many persons as held road service licences on that route." p. 78, ll. 42–48.

5. Continuing his statement of the preliminary facts, the learned Supreme Court Judge said :—

" The Ordinance came into operation on the 27th October, 1942, and the defendant Company was incorporated in November of the same year with a view to operate an omnibus service on the route mainly between Colombo and Kandy, which included certain subsidiary routes. p. 79, ll. 1–4.

30

" The plaintiff was one of those who had been duly licensed to operate an omnibus service along part of the route along which the defendant Company proposed to run its service. p. 79, ll. 4–7.

" Shortly after its incorporation, the defendant Company invited all the owners who were plying omnibuses on the route along which the defendant proposed to operate to a meeting." p. 79, ll. 7–9.

40

6. The said meeting of the owners of omnibuses and representatives of the Company was held on the 21st December, 1942, and a similar meeting followed on the 6th January, 1943. p. 79, ll 12–13, 28. p. 10, ll. 25–27.

As to what actually transpired at these two meetings was a matter of considerable dispute between the parties in the Courts below and has indeed given rise to the present litigation. The Respondents' case was

p. 10, ll. 25–41.

that at both meetings the Company's representatives offered to allot shares in the Company to them to the extent of the assessed value of omnibuses and route licences transferred by them to the Company—an offer which

p. 76, ll. 26–31.

they accepted; on the other hand, the Appellant Company's submission was that "the said meetings were held merely to discuss the terms upon which bus owners might transfer their buses, goodwill and route rights to the defendant-appellant Company."

p. 10, ll. 28–33.

7. Filing their suits in the District Court of Colombo, the Respondents, in their plaints, dated the 20th December, 1944, alleged that "the defendant company through its directors offered to the plaintiff and to other owners 10 of buses plying between Kandy and Colombo, Kurunegala and Colombo and on subsidiary routes, in consideration of a transfer to the said company of the said bus with its route licence and goodwill, shares in the said company to the amount of the value to be assessed on the said bus, its route licence and goodwill"; that, after the said assessment, the Plaintiffs

p. 10, l. 34 to p. 11, l. 9.

had transferred their respective buses and consented to the issue to the Company of exclusive road licences; that, in breach of the said agreement, the Company had wrongfully failed to allot shares to the Plaintiffs to the value of their respective assessments; and that the Plaintiffs had suffered loss and damage each month to the extent of certain arbitrary sums 20 which were specified.

In their respective plaints the Plaintiffs prayed, *inter alia*, that the Company be ordered—

p. 11, ll. 4–9.

(1) to allot and to assign to the Plaintiff shares in the Company to the extent of the assessed value of the bus or buses concerned and of the route licences and goodwill appertaining thereto; and

(2) to pay to the Plaintiff as damages a sum calculated at the rate of the said alleged loss per month from the 18th January, 1943, up to the date of action and thereafter up to the date of the allotment of the said shares. 30

pp. 11, 13.
p. 11, ll. 38–39.

8. By its Answer, and Amended Answer, dated the 23rd March, 1945, and the 21st September, 1945, respectively, the Company denied the Plaintiffs' allegations as to the agreement to allot shares and said, *inter alia*,

p. 12.

that the transfer to itself of buses and route licences and goodwill appertaining thereto and the giving of the Plaintiffs' consent to the issue of an exclusive road service licence to the Company was in consideration of certain agreed sums which, together with interest, the Company had

p. 14, ll. 20–25.

brought into Court for the Plaintiffs' benefit.

p. 63, ll. 39–40.
p. 75, ll. 15–42.

9. The seven Issues framed in the main suit (the first of these appeals) were, by consent, treated also as Issues in the other nine suits 40 which had been instituted against the Company and all of which came up for trial on the same day.

pp. 63–73.
p. 72, l. 6.

10. By his Judgment, dated the 19th August, 1946, the learned District Judge, answering all relevant Issues in the Plaintiff's favour, held that—

p. 75, ll. 20–26.
p. 72, l. 5.

(i) the Plaintiff and the Company had agreed, at two meetings held on the 21st December, 1942, and the 6th January, 1943, that the Plaintiff would transfer his bus to the Company together with

the goodwill and route licence appertaining thereto in consideration of an allotment to be made to the Plaintiff of shares in the Company to the assessed value of the said bus, goodwill and route licence;

(ii) the said agreement was valid and binding in law; p. 75, ll. 39–41. p. 72, l. 45 to p. 73, l. 14.

(iii) the Company, in breach of the said agreement, had failed to allot the said shares to the Plaintiff; p. 75, ll. 27–29. p. 72, l. 5.

(iv) the Plaintiff was entitled to a decree directing the Company to allot to the Plaintiff shares to the said assessed value of his bus, goodwill and route licence (Rs.5,000/–); and p. 75, ll. 30–34. p. 72, l. 5.

10 (v) the Plaintiff was entitled to damages at the rate of 50 per cent. per annum on the said value of the shares (i.e. on Rs.5,000/–) from the 18th January, 1943, to the date of the allotment of the shares. p. 75, l. 35. p. 72, ll. 41–42. p. 73, ll. 23–26.

11. On the question of damages it is convenient here to state that after the re-examination of a Plaintiffs' witness, the learned District Judge recorded the following note:—

"I intimate to Mr. Wickremenayake" [Counsel for the Plaintiff L. A. Perera] "that the assessment of his damages at Rs.750/– a month would be on a false basis as that would not be 20 the earning capacity of a bus after the route licence was given to the defendant Company. He therefore states that 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 P11. This will be the basis of assessment of damages in all the cases. p. 29, ll. 16–24.

"Mr. Choksy" [Counsel for the Company] "states that in view of this statement he does not want to cross-examine any of the plaintiffs on the question of damages."

12. A decree in accordance with the Judgment of the learned District Judge was entered on the 19th August, 1946, and against the said 30 decree the Company preferred an appeal to the Supreme Court. pp. 73–74.

13. By its Judgment, dated the 9th July, 1948, the Supreme Court (Wijeyewardene, A.C.J., and Nagalingam, J.) affirmed the Judgment of the District Court with the variation referred to in paragraph 1 hereof. pp. 77–84.

14. In his Judgment Nagalingam, J. (who delivered the main Judgment and with whom Wijeyewardene, A.C.J., agreed), after reciting the introductory and admitted facts (these are referred to in paragraphs 3 to 5 of this Case, *supra*) examined the evidence and arguments relating to the alleged agreement to allot shares and the Company's alleged refusal to do so. In agreement with the Court below he found that there was 40 "a completed contract between the plaintiff the other owners on the one part and the Company on the other, whereby the Company agreed to allot shares to the owners and the owners agreed to accept them" and that in pursuance of the said agreement the Plaintiffs had transferred their vehicles and route licences to the Company at agreed valuations and that they had thus become entitled to allotments of shares in the Company. He found that the Company had wrongfully refused to allot the said shares and affirmed the order of the District Court directing the Company to make the necessary allotments. p. 79, ll. 36–44. p. 80, ll. 9–11. p. 81, ll. 17–27.

p. 81, ll. 29–34.

15. On the subject of damages payable by the Company for breach of the alleged agreement to allot shares, the learned Judge (Nagalingam, J.), rejected (it is respectfully submitted, without sufficient reason) the argument advanced on behalf of the Company that assuming there was a breach by the Company of the said agreement, the Plaintiffs were not entitled to any more than the dividends declared by the Company subsequent to the date when the shares should have been allotted, and, at best, to the interest on those dividends until payment. There was evidence to the effect that the Company had for the first year of its operation—1943–44—declared a dividend of one per cent., but the learned Judge said that although the dividends "declared as disclosed" in a Company's balance sheet would normally be regarded as damages which a company would be liable to pay to a person to whom it failed to allot shares in breach of an agreement to do so, that rule could not be applied here for here the Plaintiffs had a right to have certain inaccuracies in the Company's accounts rectified. It was his view that the dividends should be arrived at after making the necessary amendments in the balance sheet.

p. 58, ll. 26–27.

p. 81, l. 35 to p. 82, l. 32.

p. 82, ll. 25–28.

10

As to the basis upon which the Court below had awarded damages, he said :—

p. 82, ll. 29–32.

"It is said that the learned Trial Judge awarded damages on some such basis, but on behalf of the Plaintiff, Counsel candidly admits that he has not been able to discover the basis upon which the Trial Judge decreed 50 per cent. per annum on the share capital as damages."

20

p. 83.

Ex. P 11, p. 108.

16. The learned Supreme Court Judge (Nagalingam, J.), then proceeded to amend the "Income and Expenditure Account" appearing in the Company's balance sheet for the period 16th January, 1943, to 15th January, 1944 (Ex. P 11). He held that, in calculating profit an item of Rs.124,179/- which appeared in the said account in respect of "Depreciation" should be deleted and that the amount of profit (Rs.10,000/-) appearing in the said Account should be increased by the addition thereto of the said deleted amount, making thus a total profit of Rs.134,179. Upon that basis of profit he held that "each share would be entitled to a dividend of . . . say Rs.20. As each share is Rs.100/- in value the dividend would be 20 per cent. for a year." The learned Judge treated this dividend of 20 per cent. as the appropriate dividend for not only the year covered by the said Account but also for subsequent years and awarded damages to the Plaintiff accordingly. And, he came to these conclusions notwithstanding that the Company had already declared a dividend of 1 per cent. for the year 1943–44 and a dividend of about 5 per cent. for the following year.

30

p. 58, ll. 26–29.

40

p. 108.

17. The amount of profit appearing in the said "Income and Expenditure Account" had been arrived at after allocating a certain sum to "Income Tax Reserve." No similar allocation was made by the learned Supreme Court Judge so that the said total sum of Rs.134,179 would appear to consist of an arbitrary mixture of net and gross profit.

18. The concluding words of the learned Judge (Nagalingam J. with whom Wijeyewardene A.C.J. agreed) were as follows :—

p. 83, ll. 36–47.

"At the time of its incorporation, *vide* P3, 5,900 shares had been allotted. On 9th November, 1943, at a directors' meeting

50

further shares aggregating to 710 were allotted among certain others. The plaintiff and the other owners would be entitled to no less than 473 shares on the basis of the share capital contributed by them. The total number of shares, therefore, in the Company, amounts to 7,083. Dividing the profit of Rs.134,179 among them, each share would be entitled to a dividend of Rs.19/99 [*sic*] say Rs.20/–. As each share is Rs.100/– in value the dividend would be 20 per cent. for an year.

"For these reasons I would affirm the Judgment of the District Court, subject to the modification that for the figure '50' the figure '20' should be substituted therein."

10

19. A decree in accordance with the Judgment of the Supreme Court was entered on the 9th July, 1948, and against the said decree these consolidated appeals to His Majesty in Council are now preferred, leave to appeal having been granted to the Appellant Company by Orders of the Supreme Court, dated the 30th September, 1948, and the 15th February, 1949, and an Order for consolidation of the appeals having been made in the Privy Council on the 29th January, 1951.

p. 84.

pp. 86, 88.

The Appellant Company humbly submits that the appeals ought to be allowed and, in so far as they relate to damages, the orders of both Courts below should be set aside, with costs, for the following among other

20

REASONS

(1) BECAUSE the Court below was in error in fact and in law when it added the said sum of Rs.124,179/– to the amount appearing as profit available for distribution in the Company's balance sheet and accounts for the period 16th January, 1943, to the 15th January, 1944.

(2) BECAUSE the plaintiffs, in the course of the proceedings, restricted their claims to such amounts as they would be entitled to for profits on the figures appearing in the said balance sheet and they were not entitled thereafter to question the accuracy of those figures.

30

(3) BECAUSE even if the said sum of Rs.124,179/– could rightly be regarded as profit, it would fall into the category of undistributed profit the benefit of which the Respondents receive as shareholders on the decree for specific performance.

(4) BECAUSE in the circumstances the substitution by the Court of a dividend for the dividend actually declared was contrary to law and reason as was the consequential judicial forecast of dividends which the Company would have paid out of its profits.

40

(5) BECAUSE the plaintiffs are not entitled upon the evidence to the damages which they have been awarded.

L. M. D. DE SILVA.

R. K. HANDOO.

Appeals Nos. 33–39 of 1950.

In the Privy Council.

ON APPEAL

from the Supreme Court of the Island of Ceylon.

BETWEEN

THE SRI LANKA OMNIBUS COMPANY LIMITED - *Appellant*

AND

L. A. PERERA - - - *Respondent*

(And Connected Appeals—Consolidated)

Case for the Appellant

A. L. BRYDEN & WILLIAMS,
53 Victoria Street,
London, S.W.1,
Solicitors for the Appellant.

The Solicitors' Law Stationery Society, Limited, Law and Company Printers
Abbey House, S.W.1. WL3005-29845