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29, 1951

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In the Privy Council.

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

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

BETWEEN— No. 33 of 1950.
 THE SRI LANKA OMNIBUS COMPANY
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants*

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— AND —

L. A. PERERA of Nittambuwa in Veyangoda
 (Plaintiff) *Respondent*

AND BETWEEN— No. 34 of 1950.
 THE SRI LANKA OMNIBUS COMPANY
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants*

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— AND —

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

AND BETWEEN— No. 35 of 1950.
 THE SRI LANKA OMNIBUS COMPANY
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants*

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— AND —

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

AND BETWEEN— No. 36 of 1950.
 THE SRI LANKA OMNIBUS COMPANY
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants*

— AND —

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

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

AND BETWEEN— No. 37 of 1950.
 THE SRI LANKA OMNIBUS COMPANY
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants*

— AND —

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

AND BETWEEN— No. 38 of 1950.
 THE SRI LANKA OMNIBUS COMPANY 10
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants*

— AND —

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

AND BETWEEN— No. 39 of 1950.
 THE SRI LANKA OMNIBUS COMPANY
 LIMITED of Norris Road, Colombo
 (Defendants) *Appellants* 20

— AND —

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

Consolidated by Order of the Judicial Committee of
 His Majesty's Privy Council dated the 29th day of
 January, 1951.

CASE FOR THE RESPONDENTS.

RECORD.
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1. This appeal arises out of seven separate actions instituted in the District Court of Colombo by Plaints all dated the 20th December, 1944, filed on behalf of the seven Respondents above-named against the Sri Lanka Omnibus Company Limited the above-named Appellants. The pleadings being in all substantial respects identical, 30

the whole of the evidence was recorded in the action brought by L. A. Perera and the judgments in that case both in the District Court and on appeal in the Supreme Court were formally entered in the records in the other cases also, appropriate decrees being drawn up for each case separately.

p. 17, l. 4.
p. 19, l. 35.
p. 43, l. 27.
p. 63, l. 37-
p. 64, l. 6.
p. 78, l. 2.

2. The judgment and decrees so entered in the District Court of Colombo on the 19th August, 1946, granted to the Respondents in substance the whole of the relief which they claimed. On appeal by the Appellants the Supreme Court by its judgment and decrees dated the 9th July, 1948, affirmed the said judgment and decrees of the District Court of Colombo subject to a modification as to the assessment of damages. The present appeal is from the said judgment and decrees of the Supreme Court dated the 9th July, 1948.

pp. 63-73, p. 73.

pp. 77-84, p. 84.

3. The issues in the appeal are first, whether, as alleged by the Respondents and denied by the Appellants, there was a valid contract by the Appellants to allot to each of the Respondents shares in their Company in consideration of the Respondents transferring to the Appellants the motor omnibuses which they had previously operated together with the route licences they had previously held and the goodwill they had built up; secondly, whether as alleged by the Appellants and denied by the Respondents, the contract was discharged by a refusal by the Respondents to take such shares; and thirdly, as to the method to be adopted in assessing damages for failure to make any allotments.

4. The Respondents were all independent motor omnibus proprietors who up to 1942 were operating their buses along various portions of the Colombo to Kandy Road and subsidiary routes pursuant to route licences duly issued to them. The prevailing system of route licences, which frequently overlapped, had however given rise to unhealthy rivalry and competition and even breaches of the peace, and in October, 1942, after an investigation by a Mr. Nelson who had been summoned from England to advise the authorities on passenger road transport problems, an ordinance was passed in October, 1942, bringing into effect as from the 1st January, 1943, an entirely new system, based upon that prevalent in England, of exclusive road service licences. This Ordinance, the Omnibus Service Licensing Ordinance No. 47 of 1942, laid down an order of priority in determining who was to hold the exclusive road service licence for any particular route and the top priority was given to a company or partnership which comprised all the previous operators on that route. Next in order of priority came a company or partnership which comprised the majority of the previous operators, the majority being determined not by the number of individuals but by the number of route licences held. Provision was further made for

p. 78, l. 13.

p. 20, l. 19.
p. 29, l. 30.

p. 78, l. 34.

the payment of compensation by the recipient of the exclusive road service licence to a previous operator whose interest was not merged in the company or partnership to whom the new licence was granted.

p. 31, l. 10.

pp. 125-7.

p. 58, l. 35.

p. 91, ll. 1-20.

5. On the Colombo to Kandy route with its subsidiaries on which the Respondents had been operating, the largest operators 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. In order to meet the situation these four persons formed the Sri Lanka Omnibus Company Limited which was incorporated on the 24th November, 1942. These four persons were the subscribers to the memorandum of association and they appointed themselves the directors, taking between them, no doubt in return for the omnibuses and route licences which they handed over, 5,850 shares of Rs. 100/- each paid up as to 90%, making a total subscribed capital of Rs. 526,500 out of an authorised capital of Rs. 1,000,000/-. In addition they took 50 shares paid up as to 90% making a further Rs. 4,500. These figures, taken from the prospectus hereinafter mentioned, no doubt included 40 shares which are allotted gratis to a Dr. A. P. de Zoysa, a barrister-at-law and advocate of the Supreme Court and member of the Municipal Council whom they invited to become Chairman of the Board of Directors. According to the same prospectus there were then left 4,100 shares of Rs. 100/- each available for subscription among omnibus owners of Kandy—Colombo and subsidiary routes.

p. 49, l. 39.

p. 91, l. 10.

p. 43, l. 41.

6. These four major proprietors no doubt contributed much in the way of route licences towards the exclusive licence which the Appellant Company had been formed to serve, but it remained to achieve the necessary priority by obtaining the route licences held by as many as possible of the smaller operators. The merger of their interests was also essential if the payment of compensation to them, assuming that the grant of the exclusive road service licence was obtained, was to be avoided. The steps taken by the Appellants to achieve these objects formed the subject matter of the actions out of which this appeal arises.

7. The Respondents' version of the history was set out in their respective Plaints as follows (taking the Plaintiff of the Respondent L. A. Perera as a specimen):—

p. 10, l. 25.

“3. After the incorporation of the Defendant Company the “directors of the said Company invited the Plaintiff *inter alios* “to two meetings held on or about the 21st December, 1942 and “6th January, 1943, respectively. At the said meetings the “Defendant Company through its directors offered to the

“Plaintiff and to other owners 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.

10 “4. The Plaintiff *inter alios* accepted the said offer. The said bus of the Plaintiff with its route licence and goodwill were assessed at Rs. 5,000/-. The Plaintiff thereafter in consideration of the said offer of the Defendant Company to allot to the Plaintiff shares to the said value in the Defendant Company in or about January, 1943, transferred to the Defendant Company the said bus and consented to the issue to the Defendant Company of the exclusive road licence in respect of the said bus.

“5. In breach of the said agreement the Defendant Company has wrongfully and unlawfully failed and neglected to allot and to assign to the Plaintiff shares in the Defendant Company to the value of Rs. 5,000/-.

20 “6. By reason of the said breach of its agreement by the Defendant Company the Plaintiff has suffered loss and damage in the value of Rs. 750 per mensem.”

The prayer in each case asked that the Defendant Company be ordered to make to each Respondent the appropriate share allotment and to pay damages up to the date of allotment.

8. The Answer of the Appellants so far as material was in each case, as amended, as follows (again taking that in L. A. Perera's case as a specimen):—

30 “3. The Defendant denies all and singular the statements contained in paras. 3, 4, 5 and 6 of the Plaintiff. p. 13, l. 25.

“4. Further answering the Defendant states—

40 “(a) that having regard to the imperative provisions contained in rule 1 in the First Schedule to the Omnibus Service Licensing Ordinance No. 47 of 1942 aforesaid the Plaintiff could not as the holder of one licence only under the Motor Car Ordinance No. 45 of 1938 authorising the use of the omnibuses on the route . . . apply successfully for an exclusive road service licence in respect of the said route, or of a route substantially the same, within the meaning of the said rule.

“(b) that in the circumstances the Plaintiff—

“(1) transferred to the Defendant the omnibus referred to in para. 2 of the Plaintiff;

“(2) transferred to the Defendant the route value
“and goodwill of the said omnibus and;

“(3) gave his written consent to the issue of an
“exclusive road service licence to the Defendant in
“consideration of a sum of Rs. 5,000/-.

“5. At a meeting of the Directors of the Defendant Com-
“pany held on November 17th, 1943, the Plaintiff, after the
“manner in which the Defendant Company’s business was
“carried on had been explained to him, refused to become a
“shareholder of the Defendant Company. 10

“6. Thereafter on November 18th, 1943, the Defendant
“Company sent the Plaintiff a cheque for Rs. 5,100/- being the
“consideration of Rs. 5,000/- aforesaid and accrued interest on
“the same at the rate of 10%.

“7. The Plaintiff refused to accept the same and returned
“the said cheque with his letter of November 20th, 1943.

“10. Even if there had been any such offer and acceptance
“as is pleaded in paras. 3 and 4 of the Plaintiff the Defendant
“denies that there was any valid offer or agreement binding in
“law on the Defendant Company in the absence of a decision of 20
“the Board of Directors at a duly constituted meeting of the
“Board of Directors authorising such offer or the conclusion of
“any such agreement.”

pp. 17-20.

9. On these pleadings issues were framed which are set out in
the Record.

10. It will be seen that the relevant events fall under three
main heads, namely (a) the meetings on the 21st December, 1942,
the 6th January, 1943 and what immediately followed; (b) the events
between January, 1943 and the 17th November, 1943; and (c) the
meeting on the 17th November, 1943 and what immediately 30
followed. It will be convenient to summarise the evidence in
relation to these three heads.

p. 20, l. 23.
p. 20, l. 20.

11. The evidence for the Respondents established that on the
16th December, 1942, the Appellants sent out to all the Respondents
a letter stating that “a meeting of all owners on the Colombo—
“Kandy Road has been fixed for Monday at 11.0 a.m. at this office
“and I shall be glad if you will kindly attend. At this meeting the
“final arrangements in connection with the running of the different
“services will be arranged. It is in your own interests to attend this
“meeting as according to the new Motor Ordinance no licence will 40
“be issued to individual owners from 1.1.43.” The meeting was
duly held, Dr. A. P. de Zoysa being in the chair supported by all the
other directors and also the Manager and Secretary of the Appellant

p. 20, l. 26.

p. 20, l. 32.

p. 20, l. 33.

- Company. Most of the Respondents were present or represented among some 15 or 20 bus owners. According to L. A. Perera “Dr. de Zoysa said that from the next year individual owners cannot “run buses and that they must form themselves into Companies and “that he was going to form such a Company and asked us whether “we would consent to join the Company. We said we consented. “Those who consented were asked to raise their hands and we all “raised our hands. Thereafter he said those who did not consent “should raise their hands and there were none. Dr. de Zoysa said
- 10 “that when we joined the Company there would be a valuation of “the buses made and to the extent of the value shares would be “given in the Company. He said that the route licences would also “be valued . . . We agreed on that day to give up our buses and take “shares in the Company . . . At the first meeting I referred to “prospectuses were shown to us showing how many shares were “outstanding and so on”. This was the prospectus P. 3 already referred to. Evidence to substantially the same effect was given by W. D. R. Gunasekera, P. B. Ranaweera (husband of Mrs. Alice Wijeratne), Arnolis Appuhamy, and Martin Appuhamy (brother of
- 20 P. Don Pabilis Appuhamy). J. Bandara and G. D. E. Malawana had not attended the meeting. Nor was anything of substance in this account, except the showing of hands, controverted by Dr. de Zoysa: his account was “Generally they agreed that the Company “should be formed and that they would join the Company. There “was no show of hands because there was no opposition. It was not “a matter for putting to the vote: they had all come and we took it “for granted that they were all agreeable to become shareholders in “the Company. I cannot remember any dissenting voice.”
12. The meeting on the 6th January, 1943, was again convened
- 30 by the Appellants sending out to all the owners a circular letter dated the 2nd January, 1943, in the following terms:—“It has been “decided to convene a meeting of all the owners plying on the “Colombo—Kandy and subsidiary routes for Wednesday the 6th “inst. and we shall be glad if you will kindly attend. It will be “necessary to bring the certificates of registration of the vehicles “owned by you to enable them to be transferred in the name of the “Company . . .” The meeting was duly held, the chair being taken by M. Jayasena (in the absence of Dr. de Zoysa) who, again according to L. A. Perera, “said that the Company is now formed and enquired
- 40 “whether we had brought the certificates of registration of our buses. “some said they had brought their certificates and others said they “would bring theirs. He then asked whether the buses had been “brought for the purpose of valuation and some said they had and “I said I would bring mine two days later . . . There was no talk “at any of those meetings of selling the buses to the Company at a “valuation. We always expected to get shares for the value of the

p. 91.

p. 33, l. 29,
p. 36, l. 4,
p. 38, l. 27.
p. 42, l. 24.
p. 40, l. 21.
p. 26, l. 7.

p. 44, l. 25.

p. 29, l. 9,
p. 90, l. 1

p. 21, l. 16.

“buses. At the second meeting a document was signed . . . (Shown “P4). That is the form that was signed that day in English and Sinhalese. I signed it on a fifty cent. stamp. All of us signed such documents. On that day when we signed these forms they “promised to give us shares for our buses. Our signatures were “obtained in order to give us those shares.”

p. 91, l. 30.

13. The Form in question (P4), heading “SRI LANKA OMNIBUS COMPANY LIMITED” read as follows:—

“I of owner of
 “motor omnibus whose distinctive numbers are mentioned 10
 “below, consent to the issue of the Exclusive Road Service
 “Licence to the above Company in terms of section 2(b) of the
 “First Schedule of Ordinance No. 47 of 1942. I undertake to
 “take shares in the above Company to the value of my omni-
 “buses mentioned below.”

p. 26, l. 8,
 p. 33, l. 39,
 p. 36, l. 13,
 p. 38, l. 35,
 p. 40, l. 29,
 p. 42, l. 28.
 p. 59, l. 37.

14. The account of this meeting given by L. A. Perera was endorsed by all the other Respondents or their representatives nor indeed was it controverted by M. Jayasena in his evidence. He said “The Company had no intention at any time not to give shares to
 “the bus owners. At the meeting of 6th January the Company said 20
 “they were willing to give shares and the bus owners accepted it
 “and signed the forms.” The Complaint was then shown to him and his attention called to paragraph 3 and he said “I admit the correctness
 “of this. The next paragraph is also correct. (Shown para. 3 of the
 “Answer.) My Proctor has denied the correctness of these two para-
 “graphs. I do not know why that has been done.” Dr. de Zoysa
 was also asked about the form P4 and he said “The forms P4 were
 “signed on a certain date. That was to ensure their forming the
 “Company. (Shown the last part of the form ‘I undertake to take
 “ ‘shares in the Company to the value of the omnibuses mentioned 30
 “ ‘below’.) That was their acceptance of the offer of the Company
 “to give them shares. We were not unwilling to give shares. This
 “document was signed as evidence to show the Commissioner that
 “we had the largest number of bus owners to join us. These forms
 “were printed at the instance of the Company. The signatures
 “were obtained by the Company. These forms were obtained by an
 “officer of the Company . . . Even without these we could have
 “obtained a licence. We did present these. Having presented these
 “among others we obtained the licence.”

p. 59, l. 43.

p. 47, l. 38.

p. 48, l. 7,
 p. 21, l. 41.
 p. 21, l. 46-
 p. 22, l. 7.
 p. 95, l. 16.

15. The ensuing valuations were carried out by the Appellants’ 40
 Manager and another employee of theirs. In the case of L. A. Perera the assessment was made on the 18th January, 1943, the total for one bus and two route licences (he kept his second bus for conversion into a lorry) being Rs. 5,000/- and on the same date he signed the

appropriate form accepting the figures. On the 23rd February, 1943, he was sent by the Appellants a receipt in the following form “Received from Mr. L. A. Perera omnibus bearing No. Z.817 transferred with its route and goodwill and also route and goodwill of omnibus Z.5007 now converted to a lorry—to the Sri Lanka Omnibus Co. Ltd. for Rupees five thousand only (Rs. 5,000)”. There was a postscript “Please note that this amount is with your Company to your credit and subject to payment of Rs. 250.75 due to Messrs. General & Transport Co. Ltd. on Hire Purchase Agreement entered into by you with the said Company.” The sum mentioned was not apparently correct as L. A. Perera held a receipt from the said hire purchase company for Rs. 238.50 expressed to be in full settlement. In the case of the other Respondents the same procedure of valuation and taking over was followed, though in one case (Mrs. Alice Wijeratne) the valuation was queried. After receiving however from the Appellants a letter stating that they were unable to consider any increase in the price already offered, viz. Rs. 2,750 and that “it was due to your wholehearted co-operation with us that we made this high offer as quite frankly the vehicle is not worth more than Rs. 2,000”, the matter was allowed to drop.

16. The events of the intermediate period are of importance mainly as controverting the evidence of Dr. de Zoysa and M. Jayasena at the hearing of the action and as showing, in the words of the Learned District Judge “how badly the Plaintiffs have been treated and how shabbily the Defendant Company have acted.” Briefly summarised they were as follows:—

(a) On the 23rd January, 1943, the Respondent L. A. Perera, writing as a shareholder, desired to have particulars given to him about the working of the Company. He was concerned by what he had heard, namely that the operations were to be conducted by branch managers who were to be allowed 90% of the gross takings of the buses under their control, a scheme which, as he put it, “will be an attractive scheme as far as the Managers are concerned”, although not so objectionable to those who had contributed buses to the pool if, as sub-managers they in turn were to be allowed 90% of the receipts of their buses. To this letter he received a bare acknowledgment but no reply. As Dr. de Zoysa put it “at that stage we did not treat him as a shareholder”.

(b) Two of the Respondents, W. D. R. Gunasekera and W. Arnolis Appuhamy, made representations to the Director of Motor Transport complaining that though they had put buses into the pool, no income payments were to be made to them for at least a year. The petition containing those representations was sent to the Appellants for attention, and their reply to

p. 110, l. 1.

p. 110, l. 15.

p. 110, l. 25.

p. 107, l. 10.

p. 111, ll. 1-30.

p. 111, l. 32,
p. 51, l. 30,
p. 112, l. 1.p. 34, l. 9,
p. 113, l. 19,
p. 114, ll. 16-40,
p. 115, l. 1.

p. 112, l. 21.

p. 51, l. 41.

p. 113, l. 28.

p. 115, l. 21.

Gunasekera was that there would be no monthly dividends “and as it is obvious from your letter that you are unable to wait until the final accounts are made up, we enclose our cheque for Rs. 8,160 in full settlement of all your accounts with us”. The Respondent Gunasekera replied that he had no desire to withdraw the capital contributed by him, that his complaint was as to the manner in which the Appellants’ business was conducted and that it was time his share certificate was issued. He returned the Appellants’ cheque adding “I am entitled to a share to this value and I shall thank you to send my share certificate without delay”. The Respondent Arnolis Appuhamy wrote in the same vein to the letter he had received and also returned the cheque and demanded his share certificate. To both these Respondents the reply of the Appellants on the 16th June, 1943, was the same, namely that the matter would be put before the Directors. 10

(c) The next meeting of the Board of Directors was on the 29th June, 1943, the Minutes of which recorded that “it was decided to reply to Mr. W. A. Arnolis Appuhamy in respect to his letter of the 5th June, 1943, that the Directors refused to grant his shares and to inform Mr. W. A. Arnolis Appuhamy that the assessed value of his bus is being paid to him”. No notification to this effect was ever sent to the Respondent Arnolis Appuhamy, Gunasekera heard nothing (in spite of letters from him on 21st August and 15th September, 1943) until the 20th September, 1943, when he was told the position of a share certificate was being gone into. Apparently Gunasekera was not even mentioned at the meeting on the 29th June, 1943. 20

(d) At the next meeting of the Board of Directors on the 27th July, 1943, it was decided according to the Minutes “to pay compensation for the omnibuses which were to be sold to the Company and for which shares have not been allotted to the following:—L. A. Perera, P. D. Pabilis Appuhamy, K. Kirinelis Perera, W. D. R. Goonesekera, G. D. E. Malawana, M. M. Matheshamy, R. A. Sirisena, W. A. Arnolis Appuhamy, H. M. J. Bandara and H. M. J. Nanayakkara.” No reasons for not allotting shares were recorded in the minutes and none of the persons named were written to. 30

(e) At a meeting of the Board of Directors on the 24th August, 1943, the minutes record that “it was resolved to allot shares to those who have surrendered their buses to the Company”, but still no shares were allotted to any of the Respondents all of whom fulfilled the condition named. 40

(f) On the 1st October, 1943, it was decided at the Directors’ Board Meeting that “shares be allotted to the follow-

“ing as from the 1st October, 1943” and then follow in the minutes 15 names, but the name of the only Respondent which appeared—W. A. Arnolis Appuhamy—had been struck out. One name however which had appeared in the list of undesirables on the 27th July, 1943, now appeared among those eligible—N. N. Matheshamy—and he was duly allotted 36 shares on the 9th November, 1943. Presumably he had toed the line.

10 (g) The next relevant minute was of the Directors’ Board Meeting on the 9th November, 1943. This minute recorded the allotment of shares to 12 people, including most of those mentioned in the minute of the 1st October and then proceeded “The following payments from the money held to the credit of “them who had handed over their vehicles were approved”: and then followed the names of 10 persons including all the Respondents except W. Arnolis Appuhamy and against each name the amount of the agreed valuation. But no cheques were sent, presumably because it was known from the previous experience with W. Arnolis Appuhamy and W. D. R. Gunasekera that they would merely be returned. What was sent was a letter in the following terms:—

20 “As intimated to you previously there is a sum of “Rs. — lying to your credit in the books of the Company. “We have to date failed to hear from you as to how we are “to dispose of the amount lying to your credit and we shall “be glad if you will call at this office on Wednesday the “17th instant at 12 noon for an interview.”

17. Before attending this interview on the 17th November, 1943, all the Respondents or their representatives, along with other bus owners who had not been allotted shares, had a meeting of their own at the office of a proctor, A. Mivanapalana in the Baudha Mandiraya at 9.0 a.m. After discussing the position and voicing complaints about the Appellants going behind their agreements, it was resolved unanimously that they would not take anything but the shares and would not accept cash instead. The evidence of all the Respondents and Mivanapalana agreed as to this. The Respondent Malawana was elected their spokesman at the interview.

18. With regard to what happened at the vital meeting of the 17th November, 1943, there was a conflict of evidence. The Respondent L. A. Perera’s version was that “Dr. de Zoysa said that the “allocation had not been completed, that if a European company “came in we would all be ousted and he said that it will take two “or three years before we could expect any dividend and that they “would pay us money. Everybody refused to take money. “Mr. Malawana said ‘You (Dr. de Zoysa) are our Minister in the

p. 117, l. 11.

p. 117, l. 32.

p. 22, l. 29,
p. 34, l. 14,
p. 36, l. 33,
p. 40, l. 28.

pp. 119-120.

p. 30, l. 6.

p. 30, l. 27.
p. 22, l. 34,
p. 26, l. 33,
p. 30, l. 27.
p. 34, l. 19,
p. 36, l. 35,
p. 40, l. 31.
p. 26, l. 42.
p. 22, l. 42.

“State Council and you are considered to be a saint and is this
 “how you do things’. He also said that we should be given our
 “shares and whether there was going to be a profit or loss we were
 “prepared to take it and that we wanted our shares and nothing
 “more. M. Jayasena got up and said ‘don’t expect anything out of
 “the 90%’. After that we decided to litigate the matter.” Sub-
 “stantially similar accounts were given by all the Respondents or
 “their representatives (except Ranaweera who had to go to the
 “hospital after the preliminary meeting): all denied in terms that
 “they had refused at that meeting to take shares.

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19. The account of this meeting given by Dr. de Zoysa was
 curious, in view of the pleadings. He started off in chief by saying
 that it was not a Directors’ meeting, although the minutes recorded
 in terms that it was. He described it as “a meeting of the bus
 “owners who had no shares at that time in the Company and I had
 “to explain to them that the Company had been formed on this
 “basis—that agencies were to be granted on a basis of 90% of the
 “gross income to go to the agent and the other 10% to go to the
 “shareholders. They were also told that they could take shares if
 “they were willing to accept those terms”. Later he said “on behalf
 “of the small bus owners I believe Malawana spoke. He said he
 “could not on any account take shares unless he is given a branch
 “or 90% of the collections of his buses. Others said they would
 “consider and let us know . . . At that meeting there was no definite
 “agreement reached. All throughout we were anxious to give them
 “shares and the whole trouble was that they imposed conditions
 “on which they asked for shares . . . I tried my best to give them
 “shares and explained to them my inability to accede to their
 “absurd proposals”. In cross examination he was asked when
 L. A. Perera refused to take shares, to which his answer was
 “I cannot say when he refused. There is no document to show he
 “refused. Personally I have no document. I have not seen any
 “document”. Challenged as to why the delay he said “The delay
 “in allotting shares was due to the fact that when we wanted to
 “allot shares, they did not want to accept them . . . They said they
 “wanted shares on the conditions they offered . . . I did not want to
 “dissuade them from taking shares . . . I did not say they did not
 “want shares: they wanted shares but they wanted the shares on
 “a certain condition . . . I did not ask them to take the money. I
 “summoned them in order to help them to take shares.” Finally
 to the Court after the close of his re-examination he said “It was not
 “a directors’ meeting. Paragraph 5 of the Answer is not correct.
 “It is not correct to say that at that meeting of the directors the
 “Plaintiffs refused to become shareholders of the Company.
 “Malawana is the only person who refused to become a share-
 “holder . . . Q. Do you know that nowhere in the Answer is there

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p. 27, l. 10,
 p. 31, l. 24,
 p. 36, l. 30,
 p. 37, l. 40,
 p. 39, l. 10,
 p. 40, l. 36.

p. 44, l. 35

p. 44, l. 40.

p. 46, l. 19.

p. 46, l. 29.

p. 46, l. 35.

p. 49, l. 4.

p. 49, l. 19.

p. 46, l. 25.

p. 50, l. 44.

p. 51, l. 9.

p. 53, l. 22.

p. 56, l. 14.

“the allegation made that they asked for special conditions? A. I do “not know”. Similarly in his cross-examination M. Jayasena said “There was a meeting on the 17th November, 1943. This meeting “was held because a number of the owners were clamouring for “shares . . . Malawana said he refused to take his shares and the “others said they would consider and let us know. Malawana “refused and the others said they would consider and let us know.” And in another passage he said “All throughout they were asking “for shares. In none of the letters have they said they wanted a
 10 “share of the 90%: they simply said they wanted shares in the “Company”.

20. There was thus really no dispute that, so far as all the Respondents except Malawana were concerned there was no refusal to take shares at the meeting of the 17th November, 1943. This was also established by the minutes of the meeting which recorded that “G. D. E. Malawana refused to join the Company as a shareholder. “Others agreed to notify their consent in writing later on”, suggest-
 20 ing that, so far as the Respondents other than Malawana were concerned, so far from refusing they had in fact consented, but were to put their consent in writing. Without waiting for any consents however the Appellants the very next day proceeded to send out cheques to them (apart from L. A. Perera who was overlooked) with a view to paying them off.

21. If in fact there was criticism of the Company for running on the so called Branch Manager system, this was not surprising. It meant, to take the case of M. Jayasena, that having handed over to the Company 41 buses he had all those buses allocated to his branch, together with (at that time) six other buses taken over from other people. Without having to produce any accounts of any sort
 30 or kind to the Company he took 90% of the gross takings of the whole fleet. Out of this he had to pay the drivers and conductors, do all the repairs and provide for replacement of the buses. In other words, so far as the profits on those buses were concerned, he put 90% into his own pocket and the shareholders were left with what was left of 10% after paying administration expenses of the head office. Significantly enough the decision to operate in this way was arrived at at the very inception of the Company's business on the 22nd January, 1943, when the only shareholders of the Company were M. Jayasena, B. J. Fernando, W. K. Fernando, P. Don Francis
 40 Alwis, Dr. de Zoysa the Chairman and one Obeyesekera the Secretary. At the same meeting M. Jayasena was appointed branch manager of A. Branch, B. J. Fernando of B. Branch, W. K. Fernando and Alwis of C. Branch. The other branch managers appointed were L. R. Perera of D. Branch and W. D. M. Pabilis Appuhamy of E. Branch. The same meeting resolved to turn the Company into a private company.

pp. 63-73.
p. 64, ll. 19-16.

p. 65, ll. 1-2.
p. 65, l. 8.

p. 68, l. 23.
p. 67, l. 11.

p. 65, l. 32.

p. 70, l. 8.

p. 70, l. 13
p. 70, l. 29.

p. 70, l. 28.
p. 73, l. 20.

p. 66, ll. 10-19.
p. 67, ll. 15-16.

p. 67, l. 34.

22. In his judgment delivered on the 19th August, 1946, the Learned District Judge found on all the disputed facts in favour of the Respondents. He pointed out that as regards the meetings of the 21st December, 1942 and the 6th January, 1943, the evidence for the Appellants was a complete admission of the Respondents' case and that there was thus a completed contract at that time adding that "it is distressing to see how the Directors of the Defendant "Company tried to wriggle out of the situation they had deliberately "placed themselves in". He analysed the intermediate history closely, pointing out that "so far back as July, 1943, the Company "had decided on not giving them shares and paying them out", and said with regard to the meeting on the 17th November, 1943, "it "seems to me fairly clear that the reason for this meeting was if "possible to get the Plaintiffs to agree to take money and not shares". As to the proceedings at the meeting he pointed out that "both "Dr. de Zoysa and M. Jayasena stated in evidence that only one "person, Malawana, refused to become a shareholder" and as regards Malawana he stated that "he was the spokesman for the "persons who attended that meeting. They had met at "Mr. Mivanapalana's office before they went to the meeting and had "decided that whatever happened they would take shares. Is it "likely then that the spokesman or ringleader would surrender his "shares and refuse to become a shareholder". He added that Dr. de Zoysa and Mr. Jayasena were supported by the minutes but held that "the subsequent conduct of the Company gives the lie to "the minutes and makes me distrust the minute altogether even in "regard to Malawana". As he pointedly remarked "Why did they "want the consents only in writing and not the refusal?" Accordingly he accepted Malawana's denial that he had refused, supported as he was by all the other witnesses for the Respondents who were at the meeting. With regard to the suggestion that the Respondents were only willing to take shares on conditions, the Learned Judge pointed out that it was not supported by a single document and was belied not only by their conduct but also by letters they had written such as the letter to Gunasekera in May, 1943, in response to his complaint to the Director of Motor Transport. And Gunasekera's letter in reply stating that he did not want to withdraw his capital and demanding his share certificate he described as "definite evidence that whatever complaints they had regarding the way the "Company did business or ran their buses, they did not want cash "or to surrender their shares".

Accordingly the Learned District Judge answered all the issues in favour of the Respondents.

23. On the defence raised in paragraph 10 of the Answer as amended that in the absence of a decision of the Board of Directors

at a duly constituted meeting of the Board of Directors authorising the offer alleged or the conclusion of the agreement alleged, the District Judge said it was taken halfheartedly, but held that there was in fact a resolution of the Board, namely on the 24th August, 1943, and that in any case a company can enter into contracts through their directors acting with authority, as he held was the case.

p. 73, l. 3.
p. 73, ll. 5-10.

24. On the issue as to damages, the Learned District Judge analysed shortly the so called Branch Manager system and described the balance sheet for the year ending 15th January, 1944, as very illuminating. Out of the gross takings of Rs. 1,676,647.38 no less than Rs. 1,508,938.77 was paid to the branch managers under the heading "Agencies' Fees". The next largest item on the expenditure side was Rs. 124,179 in respect of depreciation, notwithstanding that Dr. de Zoysa had said that all running repairs and replacements were to be at the expense of the branch managers and the minute of the 22nd January, 1943, was to the same effect. It had been admitted by Jayasena that the Income Tax Department did not accept the method of showing the income of the Company and that they had called on the Company to pay more than a lakh as excess profit duty on the basis that the profits made by the branch managers should be reckoned as the profits of the Company. The Learned District Judge agreed with Counsel for the Plaintiffs when he characterised the balance sheet as fictitious and, while conceding that it was not for the Court to question the way in which any Company was run, regarded it as proper to assess damages on the basis of the reasonable profit which a shareholder had a right to expect if the Company was run in the normal way. On the basis of Income Tax Departments assessments he reckoned that the shareholders should have received at least 50% profit and directed the damages to be calculated accordingly.

p. 72, ll. 9-14.
p. 72, l. 20.
pp. 108-9.

p. 45, l. 17.

p. 96, l. 17.
p. 60, ll. 19-25.

p. 72, l. 34.

p. 72, l. 24.

p. 72, l. 27.

p. 72, l. 41.

25. In accordance with the District Judge's judgment a decree dated the 19th August, 1946, was drawn up and entered ordering the Appellants to allot and assign to the Respondents shares to the value of their buses, route licences and goodwill as assessed and to pay by way of damages 50% per annum of the said value from the 18th January, 1943, until allotment.

p. 73.

26. On the Appellants' appeal to the Supreme Court Nagalingham J. who delivered the leading judgment said "I do not think it necessary to enter into an elaborate discussion of the oral testimony for the Learned Trial Judge has discussed the evidence fully. It is only necessary for me to observe that there is ample evidence on record to warrant the trial Court's finding and I must say that, having regard to the evidence as a whole, after giving due

p. 80, l. 32.

p. 81, l. 17. “weight for discrepancies, it cannot be doubted that the Plaintiffs
 “and the other owners insisted right along on their receiving shares,
 “but that they were questioning the propriety of the method of
 “management of the business adopted by the Company”. And later,
 after a short summary of the evidence in relation to the alleged
 refusal by Malawana, he said “I am therefore of opinion that the
 “Learned Judge’s finding that it was the Defendant Company that
 “refused to allot shares and not the Plaintiff who refused to accept
 “shares is correct . . . I would therefore affirm the order of the trial
 “Court compelling the Defendant Company to allot shares to the 10
 “Plaintiff”.

p. 79, l. 44. 27. On the issue as to whether there was an obligation binding
 on the Appellant Company to allot shares, Nagalingham J. said “it
 “has been argued that there should have been a formal application
 “for shares before allotment could take place and as no formal appli-
 “cation had been made, the Company was never under obligation to
 “allot shares. I cannot accede to this contention. The Company
 “does not appear to have prescribed any particular form of applica-
 “tion for shares. But where the Company without prescribing any 20
 “particular mode of application acting by its directors receives
 “funds, in this case vehicles and route licences which are the
 “equivalent of funds, on the promise of allotting shares, I cannot see
 “that the want of a formal application can be regarded as depriving
 “the Plaintiff or the other owners of their rights. If further proof
 “of the affirmation of the Company of the agreement on its part to
 “allot shares is required, the proof is to be found in its minutes
 “dated the 24th August, 1943”. The Respondents will further contend
 that, if any formal applications were required, the undertaking
 in the agreement form P.4 was the application which the Company
 had prescribed. 30

p. 82, l. 25.
 p. 83, l. 13. 28. On the issue as to damages Nagalingham J. differed from
 the District Judge, although agreeing with him that the balance
 sheet could be corrected as regards errors and inaccuracies. He
 regarded the Branch Manager system as involving in effect that the
 Company was not the owner or proprietor of any bus, but it is
 submitted that in this he was wrong. He held however that the
 resolution authorising the system could not be ignored. On this
 basis he calculated the total profit as being Rs. 10,000 shown in the
 accounts as left out of the surplus after finding an Income Tax
 Reserve, plus the depreciation item of Rs. 124,000 which Jayasena 40
 had conceded to be a profit of the Company. With a totality of 7,088
 shares (assuming the proper allotments had been made to the
 Respondents) the profit of Rs. 134,179 per share would be Rs. 19.99
 or 20% on the R.100/- value of the shares. He accordingly directed
 a modification of the figure of 50% in the District Judge’s judgment

p. 83, l. 30.
 p. 60, l. 17.
 p. 83, ll. 36-44.

to 20% in order to calculate the damages. The judgment of Nagalingham J. was concurred in its entirety by Wijeyewardene A.C.J. and a decree of the Supreme Court dated the 9th July, 1948, was drawn up and entered accordingly in each of the cases.

p. 84, l. 7.
p. 84.

29. From this judgment and decree of the Supreme Court dated the 9th July, 1948, the Appellants obtained conditional leave to appeal to His Majesty in Council in each of the cases on the 30th September, 1948, and the leave was made final on the 15th February, 1949.

p. 86; p. 88.

10 30. The Respondents humbly pray that the appeal should be dismissed with costs for the following among other

REASONS.

1. BECAUSE the undisputed evidence established that a contract to allot shares in the Appellant Company to each of the Respondents was made at the meetings on the 21st December, 1942 and the 6th January, 1943, and both Courts in Ceylon have concurrently so found.
- 20 2. BECAUSE the undisputed evidence established that there never had been a refusal by any of the Respondents (other than G. D. E. Malawana) to take shares in the Appellant Company and both Courts in Ceylon have concurrently so found.
3. BECAUSE both Courts in Ceylon have concurrently found that there was no refusal by the Respondent G. D. E. Malawana to take shares in the Appellant Company.
- 30 4. BECAUSE the offer of shares in the Appellant Company and the making of the contract to allot such shares was validly authorised, as both Courts in Ceylon have concurrently found.
5. BECAUSE all necessary formalities for the allotment of such shares had been carried out.
6. BECAUSE both Courts in Ceylon have concurrently found that the Appellants committed breach of the said contracts.
7. BECAUSE the damages for such breach of contract were correctly assessed by the District Judge, alternatively by the Supreme Court.

8. BECAUSE the judgment of the District Court was right and ought to be affirmed.
9. BECAUSE the judgment of the Supreme Court was right and ought to be affirmed.

C. S. REWCASTLE.

STEPHEN CHAPMAN.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

No. 33 of 1950
" 34 " "
" 35 " "
" 36 " "
" 37 " "
" 38 " "
" 39 " "

THE SRI LANKA OMNIBUS COMPANY LIMITED

(Defendants) *Appellants*

v.

**L. A. PERERA, H. M. J. BANDARA, W. D. R. GUNASEKERA,
Mrs. ALICE WIJERATNE, W. ARNOLIS APPUHAMY,
G. D. E. MALAWANA, P. DON PABILIS APPUHAMY**
(Plaintiffs) *Respondents.*

CASE FOR THE RESPONDENTS.

DARLEY CUMBERLAND & COMPANY,
36, John Street,
Bedford Row,
London, W.C.1,
Solicitors for the Respondents.