(1876) 06 PRI CK 0001

Privy Council

Case No: None

Cowasjee Nanabhoy		APPELLANT
	Vs	
Lallbhoy Vullubhoy and others		RESPONDENT

Date of Decision: June 21, 1876

Citation: (1876) 3 IndApp 200

Hon'ble Judges: Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Robert Collier, J.

On the 10th January 1857, Cowasjee Nanabhoy entered into an agreement with a number of persons, who were to form a partnership with him for the purpose of establishing a factory for the manufacture of cotton twist. As the terms of this agreement are very peculiar, it is as well to read in extenso the material parts of it. The beginning of the agreement is to this effect: To Parsee Cowasjee Nanabhoy Dawar, written by us the undersigned, (who) do give in writing to you as follows: You are establishing a factory for the manufacture of water cotton twist. For the same there have been made 100 allotments, i.e., 100 shares each; one share has been fixed at about Rs. 3,000, viz., three thousand. Relative to the same, we have given in writing to you this instrument, agreeably to the particulars written below. The first clause is this: For the above-mentioned factory (ground is to be procured), and a building is to be erected, and machinery is to be sent for from Europe, and the-same is to be set up here. In regard thereto, whatever business may have to be transacted, i.e., the employment of persons, and whatever outlays may have to be made for the said factory, the whole management thereof, all we the undersigned shareholders having agreed, have intrusted to you. That management do you duly carry on during your life-time, and the entire authority for signing and carrying on the entire management of the said factory belongs to you, and after the decease of you, Cowasjee, the whole of the shareholders are to approve of such agent or trustee as the shareholders, having held general meeting, may appoint." The second clause runs thus: "Out of the above 100 allotments, i.e., shares, as many shares as we have taken we have made known below in writing, in the place of the signature of each of us, and at the time

of signing this agreement, having paid you a deposit at the rate of Rs. 500, viz., 500 for each one share, a receipt bearing your signature was obtained." The third is in these terms: "For the above purpose, whatever may have been expended for a building and machinery, and whatever other outlays may have been made and may hereafter be made, all those we the shareholders are duly to pay in equal portions agreeably to our shares, the calls which you make in respect of the same as there may be need, we are duly to pay within 15 days" time. If within the said time of 15 days we should not pay the amount of each call of those calls which you may make, then the share or shares subscribed by us shall become forfeited, i.e., there shall not remain on the part of those who may not pay the calls, any right to the deposit to the amount of Rs. 500, viz., 500 paid per share, and the call or calls which may have been (already) paid and the money paid for the same shall be credited to the profit account of this company; and hereafter should any shareholder of the shareholders who have signed below sell or make over his share or shares to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement." The fourth runs thus: "All we shareholders having agreed to make this agreement or settlement, (viz.), that, in return for the trouble, you have been at in getting up this factory, we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows: Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory all that do you sell, and for whatever you may sell, on account of the factory, do you duly receive form this company the commission at the rate of Rs. 5, viz., 5 per cent, during your life-time, but upon purchases you are not to receive anything from the company; yet on goods which you may purchase from merchants and sell, you yourself having received a percentage, also agreeably to custom, do you duly give credit for the same to this company," and so on. The fifth relates to sending for machinery on behalf of the company, and setting up the machinery, and so forth. The 6th relates to the calling of meetings, and the remaining provisions do not for the present purpose appear to be material.

2. Cowasjee took a number of shares in the company, some of which he held up to the time of the winding up. He was undoubtedly a partner with these persons. He called up the full amount which was contemplated by this agreement, namely, Rs. 3,000 on each share, all the shares having been taken. Some time afterwards he called up another Rs. 1,000, on each share, and he also borrowed a sum of Rs. 1,50,000; he borrowed it, indeed, upon his own credit, but he charged it to the company, and he made another call of Rs. 500 per share. Upon this the shareholders became dissatisfied; meetings were called, and they came to the conclusion that the company could not be carried on profitably with the capital which had been subscribed, or which they were bound to pay, and under these circumstances they filed a bill, praying, among other things, for a dissolution and winding up of the company. The order for the dissolution was made by the High Court of Bombay, and the reasons for making it are stated in the judgment of the High Court, of which it is not necessary to read more than the following passage: "Supposing the partnership to be for a definite period, or one which is not dissoluble at

the will of the majority of the members, we are of opinion that a state of things has arisen which requires the Court to decree a dissolution. It is impossible for the business of the company to be carried on without making further calls on the shareholders, the debt is accumulating, and it appears, that even with the capital subscribed the business could not be carried on." An appeal was preferred against this judgment to the Queen in Council. The judgment was affirmed by the Queen upon the advice of this Board, but entirely without prejudice to the question whether or not Cowasjee was entitled to compensation. Subsequently the High Court of Bombay decided that he was not entitled to any compensation, and from this last decision the present appeal is preferred (see 8 Bom. H.C. Rep. 209 O.C.J.).

3. This question arises upon the construction of the contract. It is to be observed, as was properly called to their Lordships" attention by the counsel for the appellants, that this is not a contract between master and servant, or between principal and agent,--at all events, not a contract pure and simple between principal and agent,--but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of Cowasjee is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets; the less it sells the less he gets; and if it sells nothing he gets nothing. This distinction, which, indeed, is implied by the very terms used, is one which has been recognized in several cases which have come before the Courts.

4. The question is, whether from the whole of this agreement it is to be inferred, by necessary or reasonable implication, that all the co-partners of Cowasjee bound themselves to carry on the business at all hazards, or at whatever loss, at least during his life; or, in other words, whether they agreed to renounce their right of dissolving the company if they found that it could not be carried on except at a loss, or whether as an alternative to either of these two cases they agreed to pay him compensation. The part of the agreement which has been most pressed upon their Lordships is that contained in the 4th clause, wherein this is said (and, indeed, the same expression is used in the first clause), "You are to receive commission for what you sell on our account during your life-time." Certainly it appears to their Lordships that the effect of this provision would be to give Cowasjee a right to commission during his life-time, provided that the company was carried on and any commission was earned. It may also be contended, though it is not necessary to decide whether correctly or not, that these terms import an agreement that the partnership should be carried on at least as long as Cowasjee lived; but that would not be enough for the appellants, for they would have further to show that the partners relinquished the inherent right they would possess, notwithstanding that the

partnership were established for the life of Cowasjee, or even for a definite term, of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success. This right is stated in Mr. Justice Lindley''S book on Partnership, at page 243 of the last (3rd) edition, in which he says: "In a more recent and more important case, however, the Court recognized the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on, except at a loss, unless they do, the partnership will be dissolved by a Court of Equity. Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired." So, even putting it in the light most favourable for Cowasjee, that the partnership was originally intended to exist at least during the time of his life, it remains to be shown that there is any provision in this agreement from which it can be fairly inferred that his co-partners relinquished the right which they would have of applying to the Court for winding up the business if it could not be carried on at a profit, or, in the event of their exercising this right, undertook to pay him compensation. In this case the company has been wound up on almost precisely the grounds which are indicated in the passage cited from Mr. Justice Lindley''s book, and the order for winding up has been affirmed by this tribunal.

5. Their Lordships, after giving their best attention to the whole of this agreement, have come to the conclusion that by no fair and reasonable intendment can it be inferred that the partners relinquished their right of dissolving or applying to have the company dissolved under the circumstances mentioned, or that they agreed, if they did exercise this right, to pay Cowasjee compensation. For this reason they are of opinion that the case of Cowasjee fails.

6. Many cases have been called to their Lordships'' attention, decided upon the terms of particular contracts, and more or less bearing upon the present; but inasmuch as the decision of this case rests upon the words of this contract which is of a very peculiar character, their Lordships do not think it necessary or advantageous to pass those cases in review. They think it enough to say that the conclusion they have come to, that no such term as has been contended for is to be imported into this contract, appears to them in conformity with the current of decisions which have been quoted, and more especially with the last case of Rhodes v. Fonvood decided by the House of Lords (L.R. Ap. Ca. 256).

7. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court of Bombay be affirmed, and that this appeal be dismissed with costs.