M. 25 of 1947

IN THE HIGH COURT OF AUSTRALIA

CLEARY & ANOR

V.

CLEARY

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on THURSDAY, 22nd MAY, 1947.

H. E. Daw, Gov. Print., Melb.

C.12280/45

CLEARY & ANOR. v. CLEARY

REASONS FOR JUDGMENT.

LATHAM C.J.
RICH J.
STARKE J.
DIXON J.
McTIERNAN J.

REASONS FOR JUDGMENT. LATHAM C.J.

In my opinion this appeal should be dismissed. The order for restoration of the name of the company to the register may be supported by reference to a concurrence of circumstances.

In the first place, I think it is quite plain that the applicant as a shareholder is a person who is aggrieved by what happened when his father took possession of the assets of the company and no provision was made for the rights of the son as a shareholder. The circumstances to which I refer as justifying the order are, first, that the basis of the action by the Registrar-General was a declaration which was in fact false, and that that in itself affords a foundation of considerable substance for the order which was made. Then, further, the circumstances of the case taken as a whole show that it was just that the company should be restored to the register.

The son, Henry James Cleary, had 1250 shares for which he has got nothing. At the time when the company's name was removed from the register the company had a surplus in its accounts after paying creditors, and the shares had a value. There is evidence to show that he agreed at the time to what his father was doing. But I agree with the argument submitted by Mr. Dean that that agreement was conditional upon matters continuing in the same position as they had been for many years, namely that the son be employed by the father with an expectation of benefiting by the father's will. It was no absolute binding agreement to surrender his rights, but a conditional consent. With the dismissal of the son from the employment the condition upon which this consent operated disappeared, so that when the condition ceased to be fulfilled and when the father placed himself in a position in which he could not fulfil the rather vague attached condition that he would leave the business to the son by will, it appears to me that the son was no longer affected by the consent which he had given in different circumstances.

I /

I am therefore of opinion that the orders made by the Supreme Court for restoration to the register and for winding up the company should be affirmed but that a variation should be made in the order for restoration of the name of the company to the register by adding a provision reserving to all parties liberty to apply to the Supreme Court as they may be advised for a provision under sec. 295(6) of the Companies Act 1938 as may seem just for placing the company and them and each of them and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

The appeal, in my opinion, should be dismissed and the order varied in the manner which I have stated.

RICH J.: I agree that the appeal should be dismissed.

STARKE J.: I agree that the appeal should be dismissed. I would not add the variation because I think nobody applied for it in the court below and no foundation in fact is laid for it.

DIXON J.: I agree with the Chief Justice.

McTIERNAN J.: I agree that the appeal should be dismissed.

ORDER.

Appeal dismissed with costs and the order for restoration of the name of the company varied in the manner stated.