

Giuseppe Bianco - - - - - *Appellant*

*v.*

Giovanni Vincenzo Demarco, since deceased - - - *Respondent*

FROM

THE COURT OF APPEAL OF THE ISLAND OF MALTA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 6TH NOVEMBER, 1931.

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*Present at the Hearing :*

VISCOUNT DUNEDIN.  
LORD BLANESBURGH.  
LORD DARLING.

[*Delivered by* VISCOUNT DUNEDIN.]

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On or about the 8th January, 1920, the respondent Demarco was approached by one Dendrinis to embark on the venture of buying a yacht. Demarco and the appellant Bianco were well known to each other and Demarco communicated Dendrinis' proposal to Bianco. He explained that it was proposed that the capital sum of £12,000 was to be contributed by three adventurers, himself, Dendrinis and another, whose name was not at that time known, but who ultimately turned out to be one Gasan, but the rest of the money necessary was to be raised by mortgage. He was himself contributing £4,000. He then asked Bianco if he would take a portion of his share, to which Bianco answered, "I will take £2,000," and on the 8th January he paid £2,000 to Demarco. Bianco says he added the words, "and not a penny more," but as that is not admitted by Demarco it can be left out of account. The rest of the money necessary to meet the purchase price was to be raised by mortgages and the

idea was to pay off the mortgages out of freights which at the time were very remunerative. But the proposal as to the purchase of the yacht came to nothing as the yacht was bought by someone else. Dendrinos then turned his attentions to acquiring a ship called the "Ituna." Nothing was said as to £12,000. On the contrary the original contribution was to be £13,000, but the general idea was the same, namely, that the ship should be got by an initial contribution of capital by the same three, Dendrinos, Demarco and Gasan, and the necessary extra money raised by mortgage. This was so far done, but with this change, that before all the mortgages necessary had been raised (for the price of the ship was payable by instalments and, therefore, all the money was not needed at once) Gasan and Demarco had quarrelled with Dendrinos, and the partnership or co-adventurership was dissolved, and two persons of the name of Jackson took the place of Dendrinos. All these arrangements were made without Bianco being consulted in any way, but the fact of the new venture in the "Ituna" was in its initiation communicated to him, and he undoubtedly agreed and acquiesced in the fact that the £2,000 which had been paid for the yacht should be applied to the "Ituna" venture.

The "Ituna" was, in fact, purchased on the 19th April, 1920, and the initial payment was made as follows:—Demarco paid £6,000, Dendrinos £3,000, and Gasan £4,000. Barclays Bank advanced £12,500. Bills for £12,500 were endorsed by Gasan, in whose name the ship was registered, payable in quarterly instalments on the days of 9th July and 9th October, 1920, and 9th January and 9th April, 1921.

The "Ituna" made several voyages and earned remunerative freights, but not enough in themselves to pay off the mortgages. Then in 1921 the "Ituna" was lost by an explosion. An action was subsequently raised under an insurance policy against war risks and failed. The result was that as the mortgages and the bills had to be met and as the earnings of freight had not gone on long enough to make good the money due, there was a very considerable loss on the venture.

As there was no partnership deed between the co-adventurers the loss fell to be borne by them in terms of a section in the Maltese Code, which need not be quoted as it is just the same as the common law of England, in proportion to their contribution of capital. The practical result to Demarco was that, as he puts it in this action, he had to pay out £11,931 2s. 11d. The action was raised by him against Bianco to obtain a declaration that Bianco had agreed to be a co-adventurer with him to the extent of one half of his, Demarco's, share, and to recover the half of the above sum under deduction of the £2,000 paid as aforesaid and a further sum of £700 which had been paid by Bianco to Demarco on 7th July, 1920. The defendant Bianco denied that he was associated with the plaintiff as a co-adventurer to the extent of one-half of the plaintiff's share of the capital, but admitted that he "invested

the sum of £2,000 in the purchase of the ship." The £700 he said was a simple loan. The Judge of the Commercial Court pronounced a judgment declaring :—

" That the defendant was not an associate of the plaintiff in one half of the share which the latter had in the steamer ' Ituna,' but that the defendant had become an associate of the plaintiff to the extent of two thousand seven hundred pounds; (3) remitting the cause for judgment in connection with the other claim on a date to be fixed after the present judgment shall have become absolute; (4) in view of the difficulties the case has presented, ordering each party to bear his own costs."

On appeal to the Court of Appeal they reversed the judgment. Their reasons may be gathered from the following passage :—

" Whereas when the deed of partnership does not determine each partner's share of the profits and the losses, such share is in proportion to the amount contributed in the partnership estate (Article 1426 Ordinance No. VII of 1868), which provision is applicable to associations in participation. The parties interested having agreed to contribute at the formation of the association a capital of twelve thousand pounds (£12,000) then considered necessary, in three equal parts, and Bianco having accepted to contribute one half of the plaintiff's third, there can be no doubt that Bianco intended associating himself with Demarco in the proportion of one half of the latter's share. The disbursements subsequently made by Demarco, rather than contributions, constitute advances or claims against the association which should have been repaid to him from the steamer's first freights; such advances or claims could not alter his share in the association. A partner cannot, at his pleasure, alter the partnership deed by increasing his contribution and thereby his share of the profits. As Vivante (*Diritto Commerciale*, Volume II. para. 308) holds, no partner can contribute a larger share than that agreed upon, nor can he increase his contribution by not withdrawing the profits accruing therefrom; these profits are not a contribution towards the partnership funds, but a deposit. Just as Demarco by disbursing during the association further amounts which could not be obtained from third parties, could not alter his share of participation in the steamer ' Ituna ' as originally established, so also Bianco, notwithstanding those disbursements, continued to be an associate in the proportion of  $\frac{2,000}{12,000}$ , or one half of Demarco's share of one third. And as the said association was dissolved owing to the sinking of the steamer in March, 1921, Bianco is responsible for the losses sustained by the association in the same proportion, although his share thereof exceeds two thousand pounds (£2,000)."

Against this judgment the present appeal has been taken to His Majesty in Council. Their Lordships are quite unable to agree with the views above expressed by the Court of Appeal. The objections to the reasoning are numerous. It must be kept steadily in view that the defendant was no partner in the partnership or co-adventure for the purchase of the yacht. He was only a sub-co-adventurer with the plaintiff, and the sum of the contribution was only fixed by the plaintiff saying that he was a member of a partnership where his capital contribution was to be £4,000, and the defendant saying, " I will take £2,000 of it." Now so long as matters remained exactly as they were it was true that

£2,000 being one half of £4,000, it might be said that the defendant was a co-adventurer to the extent of one half of the plaintiff's share. But it is quite another affair to say that this fractional coefficient is a part of the bargain. Suppose it had been found necessary and expedient for the three partners Demarco, Dendrinis and Gasan to contribute further capital, an operation which they could do without consulting the defendant, could it possibly be said that the defendant was then bound to be co-adventurer with the plaintiff in one half of the extra capital which the plaintiff contributed? The argument that he was so bound, bad as it stands in relation to the yacht, becomes little short of fantastic when transferred to an absolutely new adventure, *i.e.*, the purchase of the "Ituna." There was no mention whatever made of a sum of £12,000 in regard to the "Ituna."

The Court of Appeal in the passage quoted spoke of the plaintiff's third share in the "Ituna." The plaintiff never had a third share in the sense of an equal third share. As a matter of fact the initial contribution of capital for the "Ituna" was not £12,000 but £13,000, of which £6,000 was contributed by the plaintiff, £4,000 by Gasan, and £3,000 by Dendrinis. Further advances of capital became necessary, and in the end the plaintiff contributed £9,500 of capital. All this is clear from the books kept by the plaintiff himself. He never consulted the defendant as to the additional advances which had to be made, and consequently the theory of the Court of Appeal that the capital remained £12,000 divided into three equal shares and that all other contributions were mere payments on loan, is, in the face of facts, purely imaginary. There is, therefore, no ground for holding the defendant a contributor in respect of half of the plaintiff's ultimate contribution. But from his acquiescence that the sum of £2,000 which he had paid for the acquisition of the yacht should be utilised for the purchase of the "Ituna," it results clearly that to the extent of the £2,000 he became a co-adventurer with the plaintiff. As to the sum of £700 there is more difficulty. This sum was undoubtedly paid by the defendant to the plaintiff on or about 7th July, 1920, when the plaintiff being in want of money applied to the defendant. The plaintiff says that he asked the defendant whether he would enter the sum "to the ship account or the cattle account," and that the defendant replied "Do as you like," and that it was entered to the ship account. The cattle account was an account referring to other transactions between the plaintiff and the defendant. The defendant says that it was a mere loan and that view was taken by the Court of Appeal. Their view, however, was almost a necessary corollary to the view they had taken on the main question, but on consideration their Lordships have come to the conclusion that the Judge of the Commercial Court was right, and that the question meant, "Will you take this as an extra contribution to capital or as a payment to be placed to your credit in the cattle transactions?" that the answer being "Do as you like," the plaintiff was entitled to do

what he did and add it to the initial capital of £2,000. As already mentioned, there are other transactions between the plaintiff and the defendant and another action depends in the Commercial Court as to these transactions.

Their Lordships will, therefore, humbly advise His Majesty to reverse the judgment of the Court of Appeal and to restore the judgment of the Judge of first instance. The appellant must have his costs of this appeal, but as in the Court below he at first took up the position that the £700 was a mere loan, there must be no costs to either party in the Courts below. The petition for the admission of further evidence must be dismissed without any order as to the costs of it.

In the Privy Council.

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GIUSEPPE BIANCO

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GIOVANNI VINCENZO DEMARCO, SINCE  
DECEASED.

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DELIVERED BY VISCOUNT DUNEDIN.

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