
(1971) 02 BOM CK 0006

In the Bombay High Court

Case No : Civil Revision Application No. 37 of 1971

Berar Trading Company Ltd.

APPELLANT

Vs

Gajanan Gopalrao Dixit

RESPONDENT

Date of Decision : 25-02-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2
Companies Act, 1956 — Section 257

Citation : (1972) 42 CompCas 48

Hon'ble Judges : Bhole, J

Bench : Single Bench

Advocate : V.R. Manohar, for the Appellant; W.G. Deo, for the Respondent

Judgement

1. The original defendants Nos. 1 and 3 being aggrieved by the judgment and decree passed by the assistant judge, Akola, in a miscellaneous civil appeal arising out of an order passed by the second joint civil judge, junior division, Akola, in a civil suit, have come here in revision.

2. The applicant No. 1 is a public limited company registered under the provisions of the Companies Act. Applicant No. 2 is now a director against whom the suit was filed by opponent No. 1. Opponent No. 2 was a chairman of the board of directors till January 24, 1970, on which date an annual general meeting of the company was held. The agenda included the election of a new director in place of opponent No. 2 who was retiring by rotation. The meeting was preside over by opponent No. 2. Opponent No. 1 was present in the meeting in person as well as by proxy for three other shareholders. There were two others, D. A. Bhalerao and D. R. Palsodkar, who were not shareholders but were present as proxies. In the said meeting applicant No. 2 was declared elected as the director of the company.

3. The opponent No. 1's grievance is that applicant No. 2 was elected illegally. He, therefore, filed suit on February 5, 1970, seeking a declaration that the resolutions adopted at the said meeting as well as the election were in

contravention of the rules and regulations and were therefore null and void. Opponent No. 1 also prayed for an injunction and, therefore, filed an application under Order 39, Civil Procedure Code, against the applicants and opponent No. 2 restraining them from giving any effect to the resolutions passed in the meeting on January 24, 1970, and for further restraining the applicant No. 2 to act as a duly elected director of the company and for participating in the meetings of the board of directors.

4. This application was opposed by the applicants on the ground that there was no allegation that any irreparable injury would be caused to the opponent No. 1 if an interim injunction was not granted and the balance of convenience was in favour of the applicants. The trial court issued an interim injunction to the effect that the resolution passed in the meeting on January 24, 1970, would not be given effect to and that the applicant No. 1 shall not permit the applicant No. 2 to record himself as a duly elected director of the company.

5. Aggrieved by this order, the applicants preferred an appeal before the District Court, Akola. The learned assistant judge who heard the appeal confirmed the order passed by the trial court as well as the interim injunction issued by it. The applicants, therefore, are aggrieved by this order passed by the learned assistant judge and have filed this revision.

6. On January 24, 1970, when the annual general meeting of the company was held, a new director in place of a retiring director was to be elected. There were five nominations for it. Three candidates withdrew in the meeting. Only two, therefore, remained for the contest. They were opponent No. 1, plaintiff, and applicant No. 2, defendant No. 3. The opponent No. 2 was in the chair. Although it was not necessary for anybody to second the proposals under the provisions of the Companies Act, it was stated in the suit that opponent No. 2 called for the names of the proposers as well as the seconders for the nomination of both the candidates. The plaintiff, opponent No. 1, was seconded not by a shareholder but by a proxy who had attended the meeting. The other candidate was proposed and seconded by the shareholders present. The chairman, opponent No. 2, therefore, ruled that opponent No. 1, Gajanan Dixit's nomination, was not validly seconded. Accordingly, therefore, he was not treated to be a candidate validly proposed and seconded. The chairman then ruled that applicant No. 2, Deshmukh, was the only candidate remaining in the field validly nominated. He therefore declared him elected. The plaintiff being aggrieved by the way the meeting was held and by the way the chairman of the meeting ruled against the provision of the Companies Act, filed the suit as well as an application for the interim injunction with which we are now concerned.

7. It is now well settled that Order 39, rule 1, Civil Procedure Code, provides for temporary injunctions ;rule 2 requires that some injury must be threatened, the injury must be a legal injury and not any fancied injury. The court in an application under this order has to enquire as to what are the contents of the rights claimed by the plaintiff. The court has not only to find the contents of the

rights claimed by the plaintiff but also has to consider whether irreparable injury or inconvenience would result to the plaintiff if the same is refused. But the learned advocates for the applicants contends here that it is not always necessary to look into both these elements. According to him in a case such as the one with which we are concerned, viz., regarding an election to a post, temporary injunction should not be granted even if a legal injury was caused unless and until the election was set aside. For this purpose, he relies on a case of this court in *Jagannath Pundlik v. Sukhdeo Onkar*. A Division Bench of this court was hearing a writ petition against an order in an election petition challenging the validity of the election of successful candidates to a village panchayat. It does not appear to me that this court laid down any ratio in this case that, even if an injury is caused, temporary injunction cannot be granted in such cases unless and until the election is finally set aside. It is to the contrary. This court did consider rule 2 of Order 39 in which the element of injury also is mentioned. This court observed in paragraph 5 that in order to prove legal injury the applicant has to establish that he has a legal right to do something and the opponent prevents him from the exercise of such right; that unless a right is alleged and/or shown to exist prima facie, there can be no question of any breach of that right. This court, however, while considering the scheme of the Panchayat Act observed at one place that the person who was elected to the office continued to act in the office until his election was set aside by a tribunal entitled to do so. Reading the whole of the judgment it does not appear to me that the startling ratio, which the learned advocate for the applicants says, was propagated. It cannot be. The very rule 2 in Order 39 shows that in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. Therefore, some injury must be threatened and some right must be claimed by the plaintiff in a suit before an application under Order 39, rule 2, is made.

8. The learned advocate for the applicants also refers to *Shamsuddin Ahmed v. Charu Chandra Biswas* as well as *Kalyanpur Lime Works v. State of Bihar*. These were also cases under Order 39, rule 2, Civil Procedure Code. They were naturally decided on the facts and circumstances of those cases. In the Calcutta case where the plaintiff filed a suit for a declaration that they were the only elected members and that the defendants were not the members, and applied for an interim injunction restraining them from attending the meeting, it was held that the likelihood of injury and inconvenience was much greater if the defendants were not allowed to function as members and that the injunction should not be granted. The Patna case also observes as follows :

"Whether an order of injunction should or should not be issued will depend on

the facts of the case, and the court must also consider the question of irreparable or serious injury and balance of convenience."

9. The learned assistant judge against whose order the present application is filed relied on Abdul Gafur v. Mustakim Ali. The plaintiff there had filed a suit for declaration that the election of the defendant as chairman of the society was void and illegal and that the defendant was not entitled to hold the office as the chairman of the said society and an interim injunction restraining the defendant from taking over charge and functioning as chairman was granted by the trial court. The defendant challenged the injunction order, inter alia, on the ground that the suit itself was barred by section 79(2) of the Assam Co-operative Societies Act. It was held there that as the plaintiff had challenged the very constitution of the managing committee which elected the defendant as the chairman, the plaintiff had a prima facie case to go to trial. u/s 79(2) of the above-said Co-operative Societies Act, the civil court's jurisdiction was not barred where the question of jurisdiction was involved regarding the subject-matter of the suit. Hence it could not be said that the suit was prima facie barred under that section. The principle there too was regarding the balance of convenience. We have to see whether an injury or inconvenience is likely to arise from refusing the injunction or it is likely to arise from granting the injunction. We have, therefore, to consider the facts and circumstances of our case.

10. Both the courts below have agreed that the plaintiff has a prima facie case in his favour. Section 257 of the Indian Companies Act which deals with the rights of persons other than the retiring directors to stand for directorship is as follows :

"257. Right of persons other than retiring directors to stand for directorship. - (1) A person who is not a retiring director shall, subject to the provisions of this Act, be eligible for appointment to the office of director at any general meeting, if he or some member intending to propose him has, not less than fourteen days before the meeting, left at the office of the company a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him as a candidate for that office, as the case may be.

(1A) The company shall inform its members of the candidature of a person for the office of director or the intention of a member to propose such person as a candidate for that office, by serving individual notices on the members not less than seven days before the meeting :

Provided that it shall not be necessary for the company to serve individual notices upon the members as aforesaid if the company advertises such candidature or intention not less than seven days before the meeting in at least two newspapers circulating in the place where the registered office of the company is located, of which one is published in the English language and the other in the regional language of that place.

(2) Sub-section (1) shall not apply to a private company, unless it is a subsidiary

of a public company."

11. The section clearly contemplates that a member was only to be proposed. It does not contemplate that he should also be seconded. In fact, the provisions of the company law contemplated the deposit of a notice of a candidate showing his intention to stand as a director. Then there is a publication in the newspapers regarding his candidature. The shareholders are to be present by proxies, by depositing the proxies according to law. There can be a demand for poll u/s 179 of the Companies Act before or on the declaration of the result of the voting of any resolution and the chairman has to accept such demand. The proxies also can demand a poll. The minutes show that the chairman ruled out the demand for poll because, according to him, the proxy represented by a person who was not a member could not demand a poll. Then in the matter of election of a director it was said by the chairman that a proxy who is not a shareholder cannot second the proposal of Dixit, opponent No. 1. This is also prima facie not correct. But when one Mr. Deo, who was a shareholder, stood up and seconded the proposal, the chairman said that it was not then open for anybody to propose, second or support any proposal. It is in these circumstances that the chairman declared that there was only one candidate, Dr. B. V. Deshmukh, and declared him to be elected as a director of the company. The plaintiff, opponent No. 1, therefore, is aggrieved by this conduct of the meeting.

12. We have a case in *In re Horbury Bridge Coal, Iron and Waggon Company* where that court was considering whether in such meetings it was necessary to second the proposal. The judgment shows that in such meetings of the companies, it was not necessary for seconding any proposal. I am, therefore, inclined to agree that the plaintiff has a prima facie case. The point that is, however, important is whether any injury is threatened and what are the contents of the rights claimed by the plaintiff. In this case, the plaintiff, opponents No. 1, wanted to be director and, therefore, had actually deposited his notice of candidature with the company on January 5, 1970, and his candidature was also published in the newspapers according to the provisions of the Companies Act. In *Joseph v. Jos* the Kerala High Court was considering the rights of a shareholder. The plaintiff, opponent No. 1, is also of course a shareholder. That court observed that the right of a shareholder to stand for election as a director of the company is an individual membership right and gives rise to a justiciable issue. It has further observed that there are two kinds of rights for a member of the company, one the individual membership right, and the other, the corporate membership rights; that so far as the corporate membership rights are concerned, a shareholder can assert those rights only in conformity with the decision of the majority of the shareholders; and that an individual membership right is a right to maintain himself in full membership with all the rights and privileges appertaining to that status. This right, according to that court, implies that the individual shareholder can insist on the strict observance of the legal rules, statutory provisions and provisions in the memorandum and articles which cannot be waived by a bare majority of shareholders. It is not, therefore, that

the plaintiff has no right or has any fancied right. He having a membership right which is justiciable, can have also a right to stand for election as a director. If there is a prima facie case that the election of the other person was against legal rules and statutory provisions, he has a right to complain. This right is therefore threatened and laid low because of the conduct of the proceedings of the annual general meeting.

13. What is the balance of convenience ? There are five directors of the company. Two directors form a quorum. Prima facie, applicant No. 2 appears to have got himself elected against the legal rules and statutory provisions. If, therefore, an injunction is granted, the business of the company cannot be stopped; it can be carried on without the newly elected director. On the other hand, if the applicant No. 2 is allowed to remain as director there is likelihood of his inflicting legal injuries not only to the plaintiff-opponent No. 1 but also to the interests of the company. In that way, he would be acting against or detrimental to the interests of the shareholders. Moreover, prima facie, an illegality was committed; such illegality should not be allowed to continue. It appears to me, therefore, that the order passed by the learned assistant judge is quite legal and proper.

14. Moreover, this is a civil revision application u/s 115 of the Civil Procedure Code. The revisional jurisdiction has its own limits. If the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity, then only this court can interfere. It would be difficult for me also to entertain this revision application u/s 115 of the Civil Procedure Code.

15. This revision application therefore is dismissed with costs.