
(1991) 04 DEL CK 0042

In the Delhi High Court

Case No : I.A. No. 1558 of 1991 in Suit No. 665 of 1991

Bharat Bhushan

APPELLANT

Vs

H.B. Portfolio Leasing Ltd.

RESPONDENT

Date of Decision : 24-04-1991

Acts Referred:

Citation : (1992) ILR Delhi 193

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Judgement

P.K. Bahri, J.—In this suit seeking a declaration that the plaintiff was and continues to be a director of the defendant-company and also for declaring that the plaintiff has not incurred any disqualification u/s 283(1)(g) of the Companies Act, thereby vacating the office of the director of the defendant-company and for a perpetual injunction restraining the defendant from holding that the plaintiff has vacated the office as director and also restraining the defendant from obstructing the plaintiff from discharging his duties and from exercising his powers and privileges as a director of the defendant-company, the plaintiff has moved the application for grant of an interim injunction till the disposal of the suit restraining the defendant from holding that the plaintiff has vacated the office as director and restraining the defendant from obstructing the plaintiff from discharging his duties and exercising his powers and privileges as a director of the defendant-company.

2. I have heard arguments for deciding this application, I.A. No. 1558 of 1991. It is averred in the plaint that the defendant-company was incorporated on July 23, 1985, and that the same was promoted by the plaintiff and his son, Vijay Bhushan, who formed one group and Harish Chander Bhasin and his associates who formed the other group and that the plaintiff, along with his associates as well as Harish Chander Bhasin, hold not less than 10% of the paid-up equity capital of the defendant-company. It is mentioned that, at the time of incorporation of the company, it was agreed between the two groups that the

management and control of the company would be exercised by the two groups jointly and that the two groups will have an equal share in the management of the company and that the name of the company was also taken from the first alphabets of the names of the plaintiff and Harish Chander Bhasin. It is then pleaded that rule 104B of the memorandum and articles of association of the defendant-company stipulated nomination by the plaintiff and his associates of up to a maximum of four persons as directors on the board of directors of the company. It is then pleaded that plaintiff was always being intimated by a written notice of the dates of holding of board meetings from time to time and the plaintiff has been attending all the board meetings of which he received a notice in writing till October, 1989. It is then alleged that, some time in October, 1989, the relationship between the plaintiff and Harish Chander Bhasin became strained as certain differences arose between the two groups but, despite efforts, the differences could not be resolved and the discussions in that respect continued in between the period October, 1989, and January, 1991. It is then pleaded that the plaintiff did not receive any written notice regarding the holding of any meeting of the board of directors after October, 1989, and had not come to know about holding of any such meeting and, in the Economic Times dated January 14, 1991, it was published that the defendant was proposing to have a public issue of shares and, on making inquiries from the Registrar of Companies, the plaintiff learnt that the defendant had filed a prospectus for registration in respect of a proposed public issue and the said prospectus disclosed the names of the directors which did not include the names of the plaintiff and his son, Vijay Bhushan. As such a prospectus, in view of the provisions of the Companies Act, is required to be signed by all the directors or their constituted attorneys, Vijay Bhushan, in order to ascertain the factual position, wrote a letter dated February 13, 1991, to the Registrar of Companies intimating that he had not ceased to be a director of the company and the prospectus filed was defective inasmuch as it did not have the signatures of all the directors. It was then pleaded that, from the office of the Registrar, it was learnt that a statutory Form No. 32 had been filed by the defendant intimating the change in the board of directors which did not include the names of the plaintiff and his son, Vijay Bhushan, mentioning that they had ceased to be directors on the ground of having incurred a disqualification on account of not attending three consecutive board meetings as per the provisions of section 283(1)(g) of the Companies Act and also in terms of article 101 of the memorandum and articles of association of the defendant-company. So, it is pleaded that the defendant-company had illegally declared that the plaintiff and his son had vacated the offices of directors inasmuch as no notice, at any time, of any meetings, had been received by the plaintiff for the alleged board meetings which the plaintiff, in the absence of receipt of any notice or knowledge, could not attend. In the alternative, it is pleaded that the plaintiff has exercised his right under article 104B by nominating himself and others as directors, vide letter dated February 18, 1991, and thus, he has become a director of the defendant-company and is entitled to have the injunction on that score in any event.

3. The suit as well as the application are hotly contested by the defendant-company. It is pleaded that the plaintiff is guilty of suppression of material facts inasmuch as the plaintiff has not disclosed some important facts and thus, he is not entitled to have the equitable relief of injunction. On merits, it is pleaded that the plaintiff and his son, Vijay Bhushan, had intentionally and deliberately absented themselves from three consecutive meetings of the board and thus had incurred the disqualification under the Companies Act as well as under the memorandum and articles of association of the defendant-company and thus, the board meetings are stated to have taken place after written notices had been served on the plaintiff. It is pleaded that the fourth annual general meeting was held on September 27, 1990, in respect of which the notices were duly issued on August 21, 1990, to all the shareholders including the plaintiff and the plaintiff was fully aware, since August 21, 1990, that he had vacated the office as a director on his failure to attend three consecutive board meetings and, by virtue of section 53 of the Companies Act, the plaintiff had notice, by operation of law, that the balance-sheet had been duly signed and filed and that he had ceased to be a director of the company. It is also pleaded that the plaintiff had not signed the balance-sheet and had also not participated in the board meeting for approval of the balance-sheet. It is pleaded that the plaintiff very well knew that, before convening the annual general meeting, the board has to finalise the accounts of the company which had to be signed by the directors and, thereafter, the same were to be presented in the annual general meeting and the annual general meeting was duly held on the date fixed and the plaintiff did not attend the said meeting at all and, thus, the plaintiff has committed gross delay and laches in bringing this suit belatedly and, thus, does not deserve any injunction. Form No. 32 u/s 303(2) was stated to have been filed with the Registrar of Companies on September 19, 1990, showing the change in the directors consequent upon the plaintiff vacating office. It was also pleaded that the paid-up capital of the company consisted of an aggregate of 6,60,900 shares whereas the plaintiff has only 500 shares which constitute 0.075% and his son, Vijay Bhushan's shares constitute only 0.015 per cent. of the total paid-up share capital of the company whereas Harish Chander Bhasin holds 50,100 equity shares. So, it is pleaded that the plaintiff does not have sufficient interest or stake in the defendant-company. It is also pleaded that, under article 104B of the memorandum and articles of association, the plaintiff had no authority to nominate any directors inasmuch as the plaintiff and his associates, at no point of time, commanded a 10% holding of the share capital of the company. So, it is pleaded that, only in case the plaintiff and his associates fulfilled the prerequisite qualification of holding such share capital, the plaintiff could exercise the right to nominate any directors. It is pleaded that the plaintiff is having his own business which is competitive with the business of the defendant and, due to his own volition or an account of lack of interest or on account of his own business considerations and/or for reasons best known to the plaintiff, he did not attend the board meetings on March 28, June 29, and August 29, 1990, consecutively, despite notices having been served on him in the same manner as notices were

being served earlier of the dates of holding the meetings. It is pleaded that, for about 16 months, the plaintiff remained silent and it is only on the eve of the public issue and with a view to damage or hurt the said issue that the plaintiff has instituted the present action in a mala fide manner. It is also averred that the plaintiff has got published misinformation in the newspapers to harm the public issue of the defendant-company and such news appeared in the newspapers Business and Political Observer dated February 22, 1991, during the pendency of the suit. It is pleaded that the defendant-company, in fact, is issuing public convertible debentures both on right basis by letter of offer and also to the members of public. It is also pleaded that the plaintiff wrongly mentioned in his letter nominating the directors that Harish Chander Bhasin has also joined with him in writing the said letter which, on the face of it, is not true.

4. In the replication, the plaintiff controverted the pleas of the defendant and reiterated his own pleas, inter alia, pleading that the defendant had not disclosed as to in what manner the notices of the board meetings in question have been issued and served on the plaintiff. The plaintiff did not specially controvert that the plaintiff had not attended the annual general meeting despite having become aware of the holding of the same and had not attended the board meeting for approving the accounts and for signing the balance-sheets. The plaintiff has, however, come out with new facts in the replication that the plaintiff and Harish Chander Bhasin had floated not only the defendant-company but also six more companies of which details are given in para 4 of the replication in which also the plaintiff and Harish Chander Bhasin and their associates hold not less than 10% of the equity shares. It appears that the plaintiff has been declared to have vacated office as director in some of those companies in a similar manner as in the present case and the plaintiff has filed certain suits challenging the said act of the defendant-company and these suits are pending in the lower courts. It appears that, as yet, the plaintiff has not been able to get any decision from the lower court on his applications seeking an interim injunction.

5. Learned counsel for the plaintiff contended that, even in the written statement and the reply filed by the defendant, it is not at all made clear as to how and in what manner the notices of the board meetings have been sent and served on the plaintiff and the presumption, if any, arising regarding the minutes of the board meetings being correctly recorded stands rebutted and prima facie, it should be held that no written notices of the board meetings have been served on the plaintiff and thus, the plaintiff cannot be deemed to have vacated the office of director by virtue of section 283(1)(g) of the Companies Act. In the alternative, he has contended that, before the plaintiff could be deemed to have vacated the office, he ought to have been served a show-cause notice by the board of directors to explain his absence from three consecutive board meetings and as the rules of natural justice have been violated by not serving any such show-cause notice, the defendant could not treat the office of director as having been vacated by the plaintiff. He has placed reliance on *Turnbull v. West Riding Athletic Club Leeds Limited* [1894] 70 LT 92 and *Richardson v. Methley School*

Board [1893] 3 Ch 510. So, he urged that prima facie the case being in favor of the plaintiff, the balance of convenience is also in favor of the plaintiff and, in case an interim injunction is not granted, the plaintiff is bound to suffer irreparable loss and so, he has urged that the interim injunction should be granted. He has argued that although the plaintiff had a minimal shareholding, yet the plaintiff is the director of the company and was associated with the company from the very beginning and he ought not to have been kept away from the affairs of the company by showing that he had vacated the office of director. He has urged that, in case a show-cause notice had been issued, the plaintiff would have given a good Explanation for not being able to attend the alleged three board meetings consecutively.

6. Learned counsel for the defendant has, on the other hand, argued that there appears to be no prima facie case in favor of the plaintiff inasmuch as the plaintiff not only did not attend the three board meetings consecutively but had also not attended the annual general meeting wherein, according to the agenda circulated earlier, a momentous decision was to be taken for inviting public issue and the plaintiff for reasons best known to himself kept away from the affairs of the company when he was very well aware that, in law, if he continued to be a director, he was supposed to sign the prospectus for public issue which he had not done and had come to the court only to harm the interest of the public issue. He has further argued that the plaintiff was also aware that a board meeting has to take place once in three months and he had remained silent from October, 1989, onwards and it would show that the plaintiff was very much aware that he had vacated the office of director and thus, did not take any interest in the affairs of the company and had belatedly instituted this suit for some ulterior motive. He also argued that there being a presumption with regard to the correctness of the minutes being maintained by the defendant-company it should be held prima facie that the presumption does not stand rebutted by a mere averment by the plaintiff that he had not been served with written notices of the board meetings. He has also argued that there is no requirement of law that any show-cause notice was required to be served on the plaintiff before the plaintiff could be deemed to have vacated the office of director under the provisions of section 283(1)(g). He has placed reliance on *Shekhar Mehra v. Kilpest (P.) Ltd.* [1986] 3 Comp LJ 234. He has also argued that the plaintiff is guilty of laches and thus is not entitled to an interim injunction and particularly a mandatory injunction as interim relief. He has relied on *Gobind Pritamdas Malkani v. Amarendra Nath Sircar* [1980] 50 Comp Cas 219 and *Life Insurance Corporation of India Vs. Sham Surat Singh and Others*, .

7. Section 283(1)(g) lays down that the office of a director shall become vacant if he absents himself from three consecutive meetings of the board of directors, or from all meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board. This particular provision does not contemplate the passing of any board resolution for showing that the office of the director has been vacated by a particular director.

It appears that the vacation of the office of director is automatic as soon as a director is found to have incurred the disability as contemplated by clause (g). Section 284 of the Companies Act, however, contemplates removal of a director by the passing of a board resolution. That provision, in fact, is not applicable where the director vacates office by virtue of incurring the disqualifications laid down in section 283. The case of *Turnbull* [1894] 70 Law Tim 92, examined the provisions of article 70 of the articles of association of a company which provided that the office of any director should be vacated on any of the five grounds enumerated therein, one of them being that a director had absented himself from board meetings for a period of three months. In the said case, the plaintiff was a director and, at a meeting of the board, he informed the chairman that he was jointly interested with one "M" in a contract but he did not specify the precise nature or extent of his interest. At a meeting of the board of which no notice was given to the plaintiff, a resolution was passed declaring his seat as director vacated for infringing article 70(e) which prohibits a director from having contracts with the company or being concerned in or participating in the profits of any contract with or work done for the company without declaring his interest. It was this particular clause (e) of article 70 which was examined by the Chancery Division and it held that, in such a case, the construction must be that something more must be done to render the seat vacant and, moreover, natural justice requires that a director shall have an opportunity of saying what occurs to him on his own behalf. As, in the said case, no opportunity of hearing had been granted to the director before passing the resolution that he had incurred the disability under clause (e) of article 70, the injunction in favor of the director was granted. The facts of the said case are distinguishable. In case a particular director acts against the interest of the company obviously the rules of natural justice do require that, before he is held guilty of such act, he should be given an opportunity of hearing.

8. It would be too much to say that in all the clauses contemplated u/s 283 where disqualifications are incurred automatically, there should be granted an opportunity of hearing to the director before he is deemed to have vacated the office of the director. It is evident that if any director is removed u/s 284 of the Companies Act, a show-cause notice is bound to be given to such a director and this was provided in section 284 itself. Section 283 contemplates vacation of office of the director on various grounds which are given in clauses (1)(a) to (1)(l). Clause (k) speaks of removal of the director in pursuance of section 284. It is evident that when section 284 itself provides for a show-cause notice being issued before passing a resolution for removing a director, no fresh show-cause notice would be required to be issued for purposes of section 283 of the Companies Act.

9. In the case of *Richardson* [1893] 3 Ch 570 rule 14 in Schedule II, Part I, to the Elementary Education Act, 1870, contemplated that a member of a school board ceases to be a member "if he absents himself during six successive months from all meetings of the board, except from temporary illness or other

cause to be approved by the board." The question which arose for consideration before the Chancery Division was whether a particular member had incurred the said disqualification or not. The plea taken by the member was that he was ill and thus he justified his absence. It was held that without, however, giving a chance to that member of defending himself, he could not have been declared in default and thus, the action of the board was termed to be illegal. The question whether a particular person has absented himself from meetings of the board due to any serious illness could be a disputed question of fact and may be in such a situation the rules of natural justice have to be observed before declaring that such a person had incurred the disqualification.

10. Section 283 merely makes the disqualification on a director for not attending three consecutive meetings without obtaining leave of absence from the board. It is not the case of the plaintiff in the present case that he had obtained any leave of absence from the board. Here the question raised is whether the plaintiff had been served with written notices for attending the board meetings or not. There was no question of giving any show-cause notice to the plaintiff to explain his position before he could be held to have vacated the office of director. A broad proposition of law cannot be paid down that, before a director incurs the disability as required by section 283, he must be given a show-cause notice or reasonable opportunity of being heard. In the case of Shekhar Mehra [1986] 3 Comp LJ 234, this very provision came up for consideration and it was held that u/s 283(1)(g), no hearing is required to be given to a director whose office has become vacant by reason of his absenting himself as vacation of his office is automatic, if absence is proved. It was also held that presumption of due service of notice u/s 53(2) of the Companies Act is to be drawn. I agree with the law laid down in this judgment and I hold prima facie that no show-cause notice was required to be served on the plaintiff before he was deemed to have vacated the office of director on his failure to attend three consecutive board meetings. In the present case, the facts that the plaintiff took no steps from October, 1989, to have any interest in the affairs of the company rather prima facie shows that the plaintiff deliberately did not attend the board meetings which he knew were bound to take place in law once in three months. Be that as it may, prima facie, it is also clear that the plaintiff did not care to attend the annual general meeting where the decision was taken for public issue. The plaintiff cannot claim in law that, in fact, he was not aware of the holding of the annual general meeting knowing very well that such notice is also published in newspaper. So, prima facie, it cannot be said that the plaintiff has a prima facie case in his favor.

11. The next contention raised by learned counsel for the plaintiff is that, in view of article 104B of the memorandum and articles of association of the defendant-company, the plaintiff was within his right to nominate a maximum of four directors and he having exercised his right by nominating himself again as director besides others could be held to be a director of the company. The said clause reads as follows :

"So long as Mr. Harish Chander Bhasin and/or Mr. Bharat Bhushan and associates hold or continue to hold not less than 10% (ten per cent.) of the paid-up equity capital of the company from time to time, Mr. Harish Chander Bhasin and/or Mr. Bharat Bhushan shall have the right to nominate up to a maximum of 4 (four) persons as director or directors on to the board of the company ..."

12. The plaintiff had sent a letter to the defendant-company mentioning that he and Harish Chander Bhasin and their associates holding 10% of the paid-up equity capital had proceeded to nominate the directors including the plaintiff. It is now admitted before me that Harish Chander Bhasin has not joined Bharat Bhushan-plaintiff in writing the said letter. So, the question to be decided is whether the plaintiff alone had such authority when admittedly the plaintiff and his associates do not hold 10% of the paid-up equity capital. Counsel for the plaintiff would like me to interpret the aforesaid clause to mean that, as long as Harish Chander Bhasin along with the plaintiff and associates hold 10% of the paid-up equity capital, the plaintiff can exercise the right to nominate the directors. It is true that the wording of this particular article is not so happy but it would not be possible to hold that the plaintiff could utilise the equity capital held by Harish Chander Bhasin for his benefit in order to become entitled to nominate the directors. It is only if, in my opinion, the plaintiff and his associates were to hold not less than 10% of the paid up equity capital that the plaintiff can nominate the directors and, in case Harish Chander Bhasin's and his associates equity capital is to be taken note of by the plaintiff, then Harish Chander Bhasin must join with the plaintiff for nominating the directors under the said article. Prima facie, this appears to be the intention of the parties as could be culled out from the aforesaid language used by the parties in drafting the said article.

13. So, I hold that the plaintiff is not entitled to have any interim injunction till the disposal of the suit. Nothing said by me in this order shall have any effect on the merits of the case which are yet to be decided by this court after holding the trial. The application is dismissed.