

(1955) 11 BOM CK 0057

In the Bombay High Court

Case No : A.F.O.D. No. 134 of 1951 and First Appeal No. 549 of 1951

Chandulal and Co. Ltd. and Others

APPELLANT

Vs

Natwarlal Chunilal Bhalakia and Others

RESPONDENT

Date of Decision : 25-11-1955

Acts Referred:

Companies Act, 1913 — Section 10, 12, 87C, 87C(1), 87C(2)

Citation : AIR 1956 Bom 257

Hon'ble Judges : Gokhale, J;Gajendragadkar, J

Bench : Division Bench

Advocate : N.V. Karlekar, in No. 134 of 1951, P.G. Kher, A.N. Suri, K.H. Panchal and S.N. Patel, in No. 549 of 1951, for the Appellant; S.N. Patel in No. 134 of 1951, G.N. Shah, B.N.P. Ajgaonkar and N.V. Karlekar in No. 549 of 1951, for the Respondent

Judgement

Gokhale, J.—First Appeal No. 134 of 1951 is filed against the decree passed by the Third Joint Civil Judge (Senior Division) at Ahmedabad in Civil suit No. 163 Of 1949 declaring that defendant No. 1 Company was not authorised and entitled to give or pay any extra remuneration to its Secretary, Treasurer and Agent for managing its affairs and on its behalf the affairs of the Bhalakia Mills Company Ltd., and the resolution passed on 20-7-1949 by the defendant No. 1 Company in that connection was ultra vires and illegal, and restraining the defendant No. 1 Company by a permanent injunction from acting up to and from paying in terms of the aforesaid resolution extra remuneration to defendant 5.

2. The circumstances which gave rise to the suit may be shortly stated as follows:-- In 1927, one Chandulal Karsandas Mashruwala, Chhotalal Bhalakia and some others thought of erecting a Textile Mill at Ahmedabad, and with that object in view they floated Chandulal and Co. Ltd. the present defendant 1 which was to be appointed to manage the Textile Mill. The share capital of the defendant No. 1 Company was Rs. 640 divided into 128 ordinary shares of Rs. 5/- each representing 0-0-1 1/2 pie of a rupee.

72 of these shares were allotted to the said Chandulal and his nominees who had agreed to manage the affairs of the defendant No. 1 Company and on its behalf to act as Secretaries, Treasurers and Agents of the Textile Mill and 5G shares were allotted to subscribers of the capital of the Bhalakia Mills Company, Ltd. and each of those persons who agreed to subscribe 171 ordinary shares, each of Rs. 100/- in the capital of the Bhalakia Mills Company was allotted one ordinary share of the defendant No. 1 Company.

Chandulal and Company Ltd. was formed on 4-1-1928 and Bhalakia Mills Company Ltd. was also registered on the same date. For the sake of brevity, the Bhalakia Mills Company, Ltd. will hereafter be referred to as "The Mills Co." and Chandulal & Co. Ltd. will hereafter be referred to as "Defendant No. 1 Co."

The management of defendant No. 1 Company and on its behalf of the Mills Co. was vested in the first instance in Seth Chandulal Mashruwala, who however resigned on 6-6-1931. He was succeeded as the Managing Agent of the two companies by Seth Jethalal Purushottamdas Bhalakia in 1932, and the following was substituted for the original Clause (15) in para. III of the Objects of the defendant No. 1 Company in its Memorandum of Association.

"(15) To appoint Seth Jethalal Purushottamdas Bhalakia as the Managing Agent of the Company to manage solely and exclusively the affairs of this Company as well as of the Bhalakia Mills Company Ltd. Seth Jethalal Purushottamdas Bhalakia or his nominee and in case of his death without any nomination such other person as his heirs, executors, administrators, assigns or legal representatives shall nominate, shall have the sole right to manage this Company as well as the Bhalakia Mills Company Ltd.

The said Jethalal Purushottamdas Bhalakia or his nominee or any other person nominated in the manner abovenamed will be the only person authorised on behalf of this Company to work as and to sign as and for the Secretaries, treasurers and Agents of the Bhalakia Mills Company Limited."

And no other member of this Company has any right to interfere in the management of this company or the Bhalakia Mills Company Ltd., and every member, present or future, is deemed to have joined the Company on this basis. This appointment is confirmed on the terms and conditions and the remuneration set out in the agreement as per revised Schedule A between the Bhalakia Mills Company Ltd. and this Company and the Board of Directors are hereby authorised to execute the said agreement as well as a further agreement as per draft approved by the Board of Directors of this Company in favour of Seth Jethalal Purushottamdas Bhalakia, with such modifications, if any, as the Board and Seth Jethalal Purushottamdas Bhalakia may agree upon".

3. The Articles of Agreement entered into between defendant No. 1 Company and the said Jethalal in connection with the managing agency were executed on 24-2-1932 and are at Ex. 126, Article 1 of this Agreement stated inter alia that the sole and exclusive right to manage the affairs of the defendant No. 1

Company was to vest "in Seth Jethalal Purshottamdas Bhalakia and/or in such other person or persons as he nominates and in case of his death without nominating his successors in the person nominated from amongst themselves by his heirs, executors, administrators, assigns or legal representatives, etc."

The said Jethalal worked as managing agent of defendant No. 1 Company till his death, which took place on 12-11-1937. Thereafter he was succeeded by Seth Narottam Jethalal, defendant 5 in the suit, by virtue of his nomination under the terms of the above Article, and the Directors of defendant No. 1 Company recognised that nomination and passed a resolution at a meeting held on 15-11-1937, stating that the said Seth Narottam-das Jethalal was to work in place of the deceased Seth Jethalal Purshottamdas with all the rights as Secretary, Treasurer and Agent which vested in the deceased Jethalal and as per agreement made between defendant No. 1 Company and the said deceased Jethalal.

That resolution is at Ex. 97. The working of the two Companies continued under this arrangement and on 21-6-1949 the defendant No. 1 Company issued a notice calling the 22nd Annual Ordinary General Meeting of the share-holders of defendant No. 1 Company on Monday, 18-7-1949 at 10 a.m. at the registered office of the Company located in the Mills Co.

The fifth item of business on the agenda in the notice was "regarding payment of Special Additional Remuneration to company"s agent Seth Narottamdas Jethalal. It appears that some of the shareholders including Jiwanlal Purshottamdas, plaintiff 6 in the present suit, objected to the inclusion of this item and therefore a notice was given by the said Jiwanlal to the Chairman of the Board of Directors of defendant No. 1 Company on 8-7-1949, stating that the subject referred to in item No. (5) in the notice could not be discussed at the said meeting.

To this notice defendant No. 1 Company gave a reply on 11-7-1949 asserting that the inclusion of item No. (5) in the agenda was quite proper and legal. Therefore Natwarlal Chunilal, plaintiff 1, for self and other share-holders, except defendants 2 to 5, of defendant No. 1 Company filed the present suit on 16-7-1949 to get a declaration that defendant No. 1 Company was not authorised or entitled to give or pay any remuneration to its Secretary, Treasurer and Agent, defendant 5 and for a permanent injunction restraining the defendant No. 1 Company from paying or giving any remuneration to the said Managing Agent, and also for a permanent injunction restraining the defendant No. 1 Company from passing or discussing any such resolution as was mentioned in the notice calling the meeting.

It appears that the plaintiffs had succeeded in getting a temporary injunction against the defendant No. 1 Company, but the same came to be dissolved on 20-7-1949 and the meeting of the Company came to be held on the said day and the resolution for extra remuneration contemplated in item (5) of the agenda was passed by the Company by 86 to 11 votes.

The plaintiffs accordingly applied for an amendment of the plaint, which was allowed on 26-9-1949, by which the plaintiffs prayed for a declaration that the resolution for giving extra remuneration, passed by defendant No. 1 Company, was ultra vires, fraudulent and illegal, for a permanent injunction restraining the Company from acting up to and paying in the terms of the said resolution extra remuneration to defendant 5.

It is the case of the plaintiffs that the Managing Agent was to be given a commission of 9 annas in the rupee in the profits of the Mills Co., and that was done by allotment of 72 shares of defendant No. 1 Company and that it was of the essence of the incorporation of the defendant No. 1 Company that the Managing Agents were not to be given any remuneration for the said management beyond this.

According to the plaintiffs, the action of the Board of Directors of defendant No. 1 Company, in proposing the resolution to give any remuneration to the Managing Agents, was ultra vires, illegal and against the objects and constitution of the Company.

According to the plaintiffs, the Managing Agents of the defendant No. 1 Company were not entitled to claim, and the Company was debarred from paying, any remuneration because the Managing Agents had agreed, in consideration of the commission of 9 annas, to manage the affairs of the defendant No. 1 Company. It was also urged that the notice calling the meeting, so far as item (5) of the business on the agenda of the meeting was concerned, was vague, illegal and invalid.

4. The defendants resisted the suit on several grounds. They stated that the Court had no jurisdiction to entertain the suit because the resolution of defendant No. 1 Company and making payment in pursuance thereof to any of the Company's employees, including its Agent, was a question of internal autonomy of the management of the Company.

They contested the plea that it was the essence of the incorporation of defendant No. 1 Company and of the appointment of its Managing Agents that no remuneration was to be paid or was made payable to the persons managing the affairs of the said Company.

They also denied that the notice convening the meeting, so far as item (5) was concerned, was vague or in any way illegal and stated that the notice was clear and specific and that the question of the amount to be fixed and the reasons for the payment of the said amount were to be discussed in the said meeting and depended on the wishes and directions of the share-holders of the Company assembled at the said meeting.

They stated that the members of the Company assembled at its adjourned meeting held on 20-7-1949 had passed by an overwhelming majority a resolution sanctioning payment of extra remuneration to its Agent, defendant 5,

as per and in the manner set out in the said resolution. The defendants urged that the plaintiffs were not entitled to get the reliefs asked for by them and Prayed for dismissal of the suit with costs.

5. On these pleadings the learned trial Judge framed several issues and held that defendant No. 1 Company was not authorised to give or pay remuneration to its agents for managing the affairs of the Company, that the notice dated 21-6-1949, so far as item No. (5) was concerned, was illegal and invalid and the resolution to give extra-remuneration to defendant No. 5 passed as per Item No. (5) of the notice, was ultra vires and illegal. The trial Court, therefore, decided the suit in plaintiff's favour and passed a decree in terms already stated above. The defendants have now come in appeal.

6. The first question that will have to be decided in this appeal is whether defendant No. 1 Company was authorised to give or pay any extra-remuneration to its Managing Agents for managing the affairs of the company, beyond what was provided for in the agreement dated 24-2-1932 between defendant No. 1 Company and Seth Jethalal Purshottamdas. For this purpose some (The documents will have to be referred to. Exhibit) 90 is the Memorandum of Association of defendant No. 1 Company with the Articles of Association and Sch. A annexed.

As already stated above, in the resignation of Seth Chandulal Mashmwala as the Managing Agent, Seth Jethalal Purshottamdas came to be appointed in his place and the original Clause (15) in para. III of the objects of the defendant No. 1 Company was substituted by a new paragraph. The Board of Directors of defendant No. 1 Company were authorised therein to execute an agreement in connection with the terms and conditions of appointment and the remuneration of the said Jethalal. That agreement is Ex. 120 and Art. 2 of the same is in these terms :

"The remuneration payable by this Company to the Managing Agent is included in the Management Commission mentioned in the agreement dated 34-2-1932 between the Ehalakia Mills Company Ltd. and this Company viz., nine annas share in a rupee of sixteen annas out of the total net amount of commission receivable by this Company from the Bhalakia Mills Company Ltd., and the shares of this company representing the said nine annas commission have already been allotted to Seth Chandulal Karsandas and Seth Jethalal Purshottamdas Bhalakia and/or the persons named by them, and this Company has therefore no liabilities to be discharged any further in respect of the said nine annas share commission."

Exhibit 136 is the Memorandum of Association of the Bhalakia Mills Company Ltd. with the Articles of Association and Sch. a annexed. The schedules annexed to Exs. 90 and 136 are identical, and the relevant portion of Clause 2 (e) of the said schedule shows that out of the total net amount of the commission payable to the Agents' firm a share of nine annas in a rupee of sixteen annas was to be called the Management Commission, while the regaining seven annas

commission was to be called the Promoters" commission.

In consideration of the work of management, 72 shares of defendant No. 1 Company representing the nine annas commission were allotted to Chandulal Karsandas Mashruwala and Seth Jethalal Purshottamdas, and on the resignation of Chandulal Karsandas Mashruwala the shares standing in his name were transferred to Seth Jethalal.

The remaining seven annas commission was payable to all the members of the Agents" firm including Chandulal Karsandas Mashruwala and Seth Jethalal Purshottamdas and their heirs, executors, assigns and legal representatives, etc., from time to time in consideration of the help given by them in promoting and floating the Bhalakia Mills Company Ltd. subscribing to and getting subscribed a large number of shares by finding persons who will subscribe to its shares and by rendering financial help.

It is, therefore, urged on behalf of the plain, tiffs that the defendant No. 1 Company was not authorised to pay any extra remuneration to the Managing Agent beyond the nine annas share in the profits of the Bhalakia Mills Company, Ltd., for which 72 shares were allotted to them.

The trial Court took the view that there was no provision either in Ex. 90 or in Ex. 126 expressly authorising an increase in the nine annas commission which was fixed as the remuneration of the Managing Agent of defendant No. 1 Company, it was also of the view that the Promoters" Commission was not to suffer a reduction in any way.

The plaintiffs" contention was that the Promoters" Commission represented by the seven annas share was not to suffer any reduction under any circumstances and the action of the defendant No. 1 Company in giving extra remuneration to its Managing Agent would tend to bring about such a reduction.

The lower Court was of the view that the appointment of Seth Jethalal as the Managing Agent of the defendant No. 1 Company and the terms and conditions of his appointment and his remuneration constituted a condition in the Memorandum of Association of defendant No. Company and the action of the company in passing a resolution giving extra-remuneration to the Managing Agent would alter that condition, and since the alteration was not made by means of a special resolution it was ultra vires of the Company. But, in our opinion, that view is not correct.

7. u/s 10. Indian Companies Act, a company cannot alter the conditions contained in its memorandum, except in the cases and in the mode and to the extent for which express provision is made in the Act, But the proviso says that any provision in the memorandum relating to the appointment of the Managing Agent and the remuneration payable to him could not be regarded as a condition, and the defendant No. 1 Company was therefore fully authorised to Propose and pass a resolution for the payment of extra-remuneration to tile Managing Agent.

In support of his argument he relied on the ruling in "Ramkumar Potdar v. Sholapur Spinning & Weaving Co. Ltd. AIR 1934 Bom 427 (A), which negated a similar argument that the rights of the managing agents which arise under the memorandum of association of the company could not be altered.

In that case the suit of the plaintiff was for a declaration that certain resolutions passed by the directors for the dismissal of the Company's agents were in contravention of the memorandum and articles of association of the company and were not binding on the members of the company. The plaintiff's argument in that case also was that the rights of the agents arose under the Memorandum of association of the Company and therefore could not be altered. But the argument was held to be quite untenable.

It was held that the material clause in the memorandum relating to agents was not a vital part of the construction of the company or a condition of the memorandum within the meaning of Section 10, Indian Companies Act. Mr. Munshi on behalf of the respondents sought to distinguish this case on the ground that whereas the clause in the memorandum, on which the plaintiffs in that case relied, was not incorporated amongst the objects of the Company, in the present case the appointment of Jethalal Purshottamdas as Managing Agent and the terms and conditions of his appointment and his remuneration were included in the objects of the Company.

Mr. Munshi, therefore, urged that the defendant No. 1 Company was not competent to pass a resolution paying extra-remuneration to the Managing Agent, without passing a special resolution as was contemplated u/s 12, Indian Companies Act.

In our opinion, this argument cannot be accepted. The mere fact that the appointment of the Managing Agent and the terms and conditions of his appointment and his remuneration were mentioned in the objects of the defendant No. 1 Company would not make the provisions relating to the appointment and the remuneration a condition contained in the Memorandum of association, as contemplated in Section 10 of the Act.

The provision relating to the appointment of a managing agent is merely a detail concerning the management of the company and a company will be entitled to regulate that detail in such manner as it likes without going to the Court for its sanction and without recourse to a special resolution, as contemplated in Section 12, Indian Companies Act.

It could not make a difference in the position even if the clause in the memorandum of association relating to the appointment of the Managing Agent was Inserted among the objects of the Company, see -- Ramchandra Lalbhai Vs. Chinubhai Lalbhai, . and the remarks of Chagla J. (as he then was) at page 81.

8. Mr. Munshi also relied, in support of the trial Court's view, on the case of -- "Ashbury v. Watson", (1885) 30 Ch D 376 (C), which held that certain

resolutions which altered the conditions In the memorandum of association in contravention of Section 13 of the English Companies Act, 1862 were not valid. In that case a provision with regard to the priority .of shares was held to be a condition in the Memorandum of association and an essential part of the constitution of the company upon which it was established because the distribution of the profits was one of the most essential parts of the constitution of the company.

Mr. Munshi says that in the present case also the distribution of the profits of the Bhalakia Mills Company Ltd. was an essential part of the constitution of the defendant No. 1 Company and therefore any action which tended to make a change in this respect would be an alteration of one of the conditions in the memorandum of association. We cannot accept that contention. As the judgment of Pry L. J. at page 384 shows, provisions in the memorandum of association with regard to details as to the management of the company would not be conditions within the meaning of the Companies Act. Ana that is also the effect of the proviso to Section 10, Indian Companies Act. In our opinion, thereof fore, the view of the trial Court that defendant No. 1 Company was not authorised to pay extra remuneration to the Managing Agent and could not pass a resolution in respect thereof cannot be accepted.

9. Then it was urged that in view of the provisions of Sub-section (2) of Section 87C, Indian. Companies Act the defendant No. 1 Company was not competent to pay any extra remuneration to the Managing Agent, unless it was sanctioned by a special resolution of the company and that the same not having been done the present resolution passed on 20-7-1849 was illegal. Sub-section (1) of Section 87C says that

"where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the Mar-aging Agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment In the case of absence of or inadequacy of profits, together with an office allowance to be defined. in the agreement of management."

Now, Section 87C was inserted in the Indian Companies Act by the Amendment Act 22 of 1936, which came into operation on 15-1-1937, and It is urged that since defendant 5, Seth Narottamdas, was appointed as Managing Agent on 15-11-1937, the provisions of Section 87C would apply to* his appointment and no extra-remuneration could be paid to him, unless it was sanctioned by a special resolution of the company.

Exhibit 97 is the resolution passed at the meeting of the Board of Directors of defendant No. 1 Company on 15-11-1937. It recorded that in place of the deceased Seth Jethalal Purshottamdas, Seth Narottamdas Jethalal (defendant 5) was to work with all the rights as Secretary, Treasurer and Agent of the deceased Seth Jethalal Purshottamdas, as his legal representative in virtue of his own right

and in virtue of his nomination, as contemplated by the agreement made between the Bhalakia Mills Company Ltd. and the defendant No. 1 Company.

It cannot, therefore, be said that defendant No. 1 Company had appointed defendant 5 as its Managing Agent after the commencement of the Indian Companies (Amendment) Act, 1936, that is to say after 15-1-1937. Defendant 5 replaced the deceased Seth Jethalal as a Managing Agent of defendant No. 1 Company by virtue of the provisions in the Memorandum and Articles of Association of defendant No. 1 Company and as per agreement made between defendant No. 1 Company and Seth Jethalal.

If that be so in our opinion, the provisions of Section 87C, Indian Companies Act have no application and would not require defendant No. 1 Company to pass a special resolution for payment of extra remuneration to its Managing Agent.

10. It was also, urged that the notice dated 21-6-1949 of the general meeting, sent to the plaintiff was not valid in so far as item No. (b) was concerned, and that therefore the resolution regarding payment of extra remuneration was illegal.

Mr. Munshi relied, in support of his contention regarding the validity of the notice, on -- Narayanlal Bansilal Vs. The Maneckji Petit Manufacturing Co. Ltd., which held that the resolutions passed by the company in that case were not valid and binding on the company as the notice convening the meeting and the circular accompanying it did not give a sufficiently full and frank disclosure of the facts upon which the shareholders were asked to vote.

Mr. Munshi made a similar grievance of the notice in the present case (Ex. 91A) and says that item (5) on the agenda of business did not contain a frank and full disclosure of all that was going to be presented at the meeting regarding the subject of additional remuneration to the Company's Agent. We do not think that there is any substance in this argument.

As soon as the notice was received, the present plaintiffs seem to have immediately moved in the matter and plaintiff 6, Jiwani Lal "Purshottamdas, gave a notice to the Chairman of the Board of Directors objecting to the inclusion of Item (5) on the agenda of the meeting. To that notice, as already stated, defendant No. 1 Company gave a reply that the inclusion of the Item was quite proper and legal, and before the meeting could be held the present suit came to be filed on 16-7-1949 by plaintiff 1 for self and other shareholders who agreed with him.

In our opinion therefore, the finding of the trial Court that the notice convening the annual general meeting, so far as item (5) was concerned, was illegal is not correct.

11. No other points were urged on behalf of the respondents in support of the decree of the trial Court. We may point out that after the present appeal was filed by the original defendants, defendant 5 Seth Narottamdas, died, and his legal representatives have been duly brought on record. It is not urged that

the appeal would in any way be affected on account of the death of the original defendant 5.

12. We, therefore, allow First. Appeal No. 134 of 1951, set aside the decree of the trial Court, and dismiss the plaintiffs' suit with costs throughout, costs to be paid by respondent 6 (original plaintiff 6). The cross objections also fail and are dismissed with costs.

13. First Appeal No. 549 of 1951 was allowed to stand over on the request of Mr. A. S. Pradhan, who pleaded want of instructions from his clients and therefore wanted an adjournment. When the appeal was again fixed for hearing Mr. Karlekar, on behalf of the respondents urged a preliminary objection that the appeal had become incompetent on account of the death of respondent 5 (original defendant 5) and though his heirs, and legal representatives were brought on record, the plaintiffs could have no cause of action against them and could not prosecute the appeal.

In the suit out of which, this appeal has arisen, the plaintiffs challenged the validity of the appointment of Seth Narottamdas Jethalal as the Managing Agent of Chandulal and Company Ltd., (defendant 1) and prayed for a declaration that defendant 5 was not validly and legally appointed Managing Agent of defendant No. 1 Company and for an injunction restraining defendant 5 from acting as such.

The trial Court held that the plaintiffs were not entitled to such a declaration and injunction and dismissed the plaintiffs' suit with costs. As the original defendant 5 Seth Narottam Jethalal is now dead, it is obvious that the plaintiffs' right to sue does not survive against either defendant No. 1 Company or the , and legal representatives of defendant 5. This position has been conceded by Mr. Munshi.

14. First Appeal No. 549 of 1951 must, therefore, fail and must be dismissed. There will be no order as to costs of this appeal in the circumstances of the case.

15. Order accordingly.