
(2003) 02 BOM CK 0030

In the Bombay High Court

Case No : Appeal from Order No. 436 of 2002 in Notice of Motion No. 5215 of 1998 in S.C. Suit No. 5988 of 1998

C.P. Singhania and Others

APPELLANT

Vs

Garware Club House and Others

RESPONDENT

Date of Decision : 14-02-2003

Acts Referred:

Companies Act, 1956 — Section 177, 179, 25, 25(6), 255

Citation : (2004) 1 BomCR 225 : (2005) 124 CompCas 561 : (2004) 1 MhLj 212 : (2003) 46 SCL 659

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : A.V. Bajaj and Utpal Joshi, for the Appellant; Ashok Desai and Jai Chinai, Harsh A. Desai and C.D. Mehta, instructed by Dhruva Liladhar and Co. for the Respondent No. 1 and Janak Dwarkadas and N.T. Dutia, instructed by Nameet and Co. for the Respondent Nos. 4 to 14, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard the learned counsel for the parties.
2. The appellants are the members of the Garware Club House - an association registered as a company on April 6, 1993 after obtaining a licence u/s 25 of the Companies Act, 1956, (for short the Act). The company is permitted not to add the word "Limited" at the end of its name. The main objects as enumerated in clause No. III of the Memorandum of Association of the Garware Club House - the defendant No. 1 (hereinafter referred to as the company) interalia are (i) to acquire and take over as a going concern the effects, assets and liabilities of the then unincorporated association known as B.C.A. Garware Club House at Wankhede Stadium, D. Road, Churchgate, Mumbai - 400 020 and enrol its present members of all categories as members of the company and to run and manage the said B.C.A. Garware Club House and (ii) to promote, encourage, organise, manage or assist in the promotion, organisation or management of all

forms of athletics, sports, past timers and recreations, sporting events, entertainments, exhibitions displays tours and tournaments.

3. The management of the company vests in its Board of Directors which is called as the Managing Committee. The directors are called as "the members of the managing Committee" or simply "the Committee members". The names of the first committee members were mentioned in Clause (b) of Article 25 of the Articles of Association of the company and their term was for a period of five years commencing from the date of incorporation. First election to the post of directors (committee members) was held on 25th September, 1998. The Plaintiff Nos. 1, 3, 4, 5 and 6 in the Suit No. 5988 of 1998 contested the election. Plaintiff No. 1 was elected as an Honorary Secretary while plaintiff Nos. 3, 4, 5 and 6 lost the elections. Thereafter, the suit giving rise to the present appeal, bearing S.C. Suit No. 5998 of 1998, was filed by the plaintiffs in the Court of the City Civil Judge, Mumbai for a declaration that the election conducted by the first defendant company on 25th September, 1998 and/or the result thereof was illegal, null and void and for a direction to the defendant No. 1 to hold fresh elections. The grounds for setting aside the election urged in the suit are:

(i) Byelaws for election framed by the managing committee were not approved by the Annual General Meeting. The elections were not as per law and therefore void;

(ii) Only the members of B.C.A. Garware Club House who were the members as on 4th December, 1989 were entitled to vote and those who were subsequently admitted as members of B.C.A. Garware Club House and consequently became members of the company on its incorporation had no right to vote, because, they were admitted in pursuance of an interim order dated 4th December, 1989 passed by this Court (Coram: V.P. Tipnis, J. in Civil Application No. 4347 of 1989 in Appeal from Order No. 1037 of 1987) which restricted their rights.

(iii) There were malpractices in the elections.

4. By the Notice of Motion No. 5215 of 1998, the plaintiffs applied for an interim relief restraining the defendant Nos. 4 to 15 who were elected as directors from acting as the members of the Managing Committee and prayed for the appointment of an Administrator in their lace. By an order dated October 9, 2001, the learned City Civil Judge dismissed the motion. That order is challenged in this appeal.

5. In this court, the learned counsel for appellants did not press the third ground of challenge mentioned above and it is therefore not necessary to consider the same.

6. There were some disputes between Bombay Cricket Association (a society registered under the Societies Registration Act) and B.C.A. Garware Club House (an unregistered association represented by its office bearers) culminating into a suit bearing No. 5198 of 1986 being filed in the City Civil Court, Mumbai. In Civil

Application No. 4737 of 1989 in appeals bearing A.O.No. 1057 of 1987 with A.O.No. 1035 of 1987, arising out of an interim order passed in that suit, this court passed the following order:

"Heard Mr. Zaiwala for the respondents and Shri Madon for the Petitioners. The earlier interim order dated 14.12.87 is modified as under:-

The respondent or B.C.A. Garware Club House will be at liberty to enroll new members, so as to increase the total number of members only to 10,500. However, the status and rights and liabilities of such new members will be subject to the result of the appeal. No equity or right will be created in their favour by mere fact that they are made members. This will be clearly made known to the new members before they are enrolled. "

In pursuance of this order several persons were enrolled as the members of B.C.A. Garware Club House subject to the final result of the suit. While deciding the appeals finally, this court directed that this interim order shall continue to operate during pendency of the suit in the City Civil Court, Mumbai. The suit is still pending and the order thus continues to be in force. Learned counsel for the appellants contends that the persons who were enrolled as members of B.C.A. Garware Club in pursuance of this order of the court, had no right to vote at the election of the office bearers of the company because, their status, right and liabilities are subject to the final result of the suit.

7. During the pendency of Suit No. 5198 of 1986, the defendant No. 1 company was incorporated and registered u/s 25 of the Act. The members of the B.C.A. Garware Club House were taken as members of the company. On incorporation, the rights and liabilities of the members of the company would be governed by the provisions of the Act, and the Articles of Association of the company. The restrictions, if any, on their rights as members of B.C.A. Garware Club House-the unincorporated Association - would not haunt their rights as members of the company which are governed by its Articles and the Act. As long as their names are entered in the register of members maintained u/s 41 of the Act, they would have a right to vote u/s 87 of the Act. That right is not in any way abridged by the order of this court passed in A.O. Nos. 1057 of 1987 with A.O.No. 1035 of 1987 or the Civil Application therein. There is no order of any court restricting their right to vote as members of that unincorporated association B.C.A. Garware Club House) much less of the defendant No. 1 company. In the circumstances, the second contention of the appellants is rejected.

8. The appellants who were the original plaintiffs have alleged that election bye laws were framed by the managing committee without the approval of the General Body. They have also alleged that the election of the office bearers was illegal, null and void and have further prayed for injunction restraining the defendants from continuing as directors/members of the managing committee. Learned counsel for the appellants submitted that in any event, the continuation of the respondent Nos. 4 to 15 (Original defendant Nos. 4 to 15) as the members

of the managing committee even today, is contrary to Section 255 of the Act, and the court should therefore, grant an injunction preventing them from usurping the office and acting as members of the managing committee of the company. The learned counsel for the company and defendant Nos. 4 to 14 submitted that this challenge to the continuation in office of the respondent Nos. 4 to 15 by virtue of Section 255 of the Companies Act 1956 was not raised in the suit and hence cannot be allowed to be raised in the appeal. The issue whether the respondent Nos. 4 to 15 are today entitled to act as members of managing committee arises on account of subsequent event viz. passage of time. All the facts which are necessary for the purpose of considering whether the continuation of the respondent Nos. 4 to 15 in the office is illegal and invalid are on record. After this point was raised, the respondents took time to file additional affidavit and have filed an affidavit dated 11th February, 2003 specifically dealing with that contention and have also tendered two compilations of relevant papers. The affidavit and the complications contain all the necessary facts. The respondents thus had the full opportunity to meet the contention of the appellants. In view of this, the objection of the respondents for considering the submission of the appellants is overruled.

9. Sections 255 and 256 of the Act, read as under:-

255 Appointment of Directors and proportion of those who are to retire by rotation.-

(1) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two thirds of the total number of directors of a public company, or a private company which is a subsidiary of a public company shall-

(a) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

256 Ascertainment of directors retiring by rotation and filling of vacancies.

(1) At the first annual general meeting of a public company, or a private company which is a subsidiary of a public company, held next after the date of the general meeting at which the first directors are appointed in accordance with Section 255 and at every subsequent annual general meeting, one third of such of the directors for the time being as are liable to retire by rotation or if their number is not three or a multiple of three, then the number nearest to one third shall retire from office.

(2) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment but as between persons who became directors on the same day, those who are to retire shall in default of and subject to any agreement among themselves be determined by lot.

(3) At the annual general meeting at which a director retires as aforesaid the company may fill up the vacancy by appointing the retiring director or some other person thereto.

4(a) If the place of the retiring director is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week at the same time and place or if that day is a public holiday till the next succeeding day which is not a public holiday at the same time and place.

(b) If at the adjourned meeting also, the place of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been reappointed at the adjournment meeting, unless-

(i) at that meeting or at the previous meeting a resolution for the reappointment of such director has been put to the meeting and lost

(ii) the retiring director has by a notice in writing addressed to the company or its Board of directors expressed his unwillingness to be so reappointed;

(iii) he is not qualified or is disqualified for appointment;

(iv) a resolution whether special or ordinary is required for his appointment or reappointment in virtue of any provisions of this Act or

(v) the proviso to Sub-section (2) of Section 263 is applicable to the case.

10. Following propositions emerge from reading Sections 255 and 256 and 263. In respect of a public company or a private company which is subsidiary of a public company.

(i) Not more than 1/3 of the total number of directors can be the directors who may not be liable for retirement (like directors who are appointed under an agreement as nominee directors of financial institutions who have lent money to the company). The remaining directors (hereinafter referred to as the elected directors) have to be elected in the general meeting.

(ii) Articles may provide for retirement of all the elected directors at every Annual General Meeting (for short A.G.M.)

(iii) Unless Articles provide for retirement of all the elected directors at every A.G.M. 1/3 of the elected directors (or where number is not divisible by 3, then the number nearest to 1/3 shall retire by rotation. The elected directors who have been longest in office since their last appointment shall retire earlier than

others and as between the elected directors appointed on the same day, in default of agreement, the retirement will be determined by lots.

(iv) The vacancy caused by retirement of the elected directors may be filled in by appointment of the retiring directors or any other directors in their place. The elected directors shall, subject to the Articles, be appointed only at the general meeting of the company.

(v) The resolution regarding appointment of each of the elected directors shall be moved separately for each elected directors unless the company has earlier unanimously resolved to move the resolution for appointment of two or more elected directors jointly.

11. The Articles of Association of the respondent No. 1 company do not provide for retirement of all the directors every year and therefore, 1/3rd of the directors should have retired in the Annual General Meeting held in the year 1999, 1/3rd of the directors should have retired in the Annual General Meeting held in the year 2000 and 1/3rd of the directors should have retired in the Annual General Meeting held in the year 2001. In *Krishnaprasad Jwaladutt Pilani Vs. Colaba Land and Mills Co. Ltd.*, this court held that the director shall be deemed to have vacated his office on the latest day on which the Annual General Meeting in which he was to be re-elected should have been held. One third of the number of directors of the company were liable for retirement every year and thus all the directors should have retired latest by the Annual General Meeting held in 2001 and therefore, none of the directors have a right to continue as a director after the Annual General Meeting of 2001.

12. The respondents referred to and relied upon Section 263A of the Act and contended that the provisions of Sections 177, 255, 256 and 263 of the Act would not apply to the respondent No. 1 company as it is a club which does not carry on business for profit and the Articles of Association prohibit payment of dividend to the members. Section 263A of the Act reads as under:

263A. "Nothing contained in Sections 177, 255, 256 and 263 shall affect any provision in the articles of a company for the election by ballot of all its directors at each annual general meeting if such company does not carry on business for profit or prohibits the payment of a dividend to its members."

13. Reliance was placed emphatically on the marginal note of section 263A which apparently says that Sections 177, 255, 256 and 263 shall not apply in relation to the Companies which do not carry on business for profit or prohibit payment of dividend to its members. It is a well settled principle of law that marginal note does not govern the interpretation of the section and cannot be looked into when the meaning of the section is clear, albeit there is some difference of opinion as to whether the marginal note can be looked into when the interpretation of the section is not clear. It is however, not necessary to look to the marginal note as the wording of Section 263A is clear and there is no ambiguity in its meaning. Section 263A only protects the provisions in the Articles of Association of a

company for the election of all its directors by ballot. The normal rules that resolution for appointment of each director should be put to vote individually (See Section 263) and that the voting should be initially by show of hands (See Section 177) unless poll is demanded u/s 179 are only permitted to be relaxed by a suitable provision in the Articles of Association of a company which does not carry on business for profits or prohibits the payment of a dividend to its members. It is possible for such a company to provide by its Articles that election of directors shall take place by ballot and not by show of hands and that the resolution for appointment of each director need not be moved individually. This is the only concession available u/s 263A of the Act. Section 263A cannot mean that all other provisions of Section 255 and 256 of the Act relating to the appointment and retirement of directors would also be not apply to such a company.

14. Mr. Desai, learned counsel for the respondents however, invited my attention to Sub-section (6) of Section 25 of the Companies Act 1956 which reads thus:-

"(6) It shall not be necessary for a body to which a licence is so granted to use the word "Limited" or the words "Private Limited" as any part of its name and, unless its articles otherwise provide, such body shall, if the Central Government by general or special order so directs and to the extent specified in the directions, be exempt from such of the provisions of this Act as may be specified therein."

15. It was contended that the defendant No. 1 company was exempted by the Central Government from the provisions of Section 255 and 256 of the Act to the extent of holding elections of all or 1/3rd of the total number of directors every year. My attention was invited to Clause (C) of Article 41 of the Articles of Association which reads as:

41. "Business at Annual General Meeting:

(a)

(b)

(c) once in five years to elect a President, Vice President, Hon.Treasurer and eight members of the Committee.

(f)

(Underlining supplied and parts not relevant are omitted)

16. Clause (c) of Article 41 specifically provides that elections for the office of directors are not to be held every year but are to be held only once in five years. Shri Desai submitted that since these Articles were approved by the Regional Director exercising the powers of the Government of India, the company has been exempted from the provisions of Section 255 and 256 of Act to the extent to which contrary provision is made in Clause (c) of Clause 41 of the Articles of Association of the company.

17. The promoters of the respondent No. 1 company before its incorporation made an application on 4th/18th December, 1992 to the Regional Director exercising the powers of the Central Government, for a licence to register a company u/s 25 of the Act. Along with the application, they submitted copies of the draft Memorandum of Association and draft Articles of Association of the proposed company. After exchange of correspondence, by a letter dated 19th March, 1993, the Regional Director directed the defendant No. 1 company to make certain modifications in the Articles of Association submitted by the company and further informed that the application for the licence u/s 25 of the Act shall be processed further on receipt of duly corrected copies of the Memorandum of Association and Articles of Association of the proposed company. The company did carry out the amendments as directed. Thereafter, the Regional Director exercising the powers of the Government of India vide his letter/order dated 1st April, 1993 granted the licence to the defendant No. 1 company permitting it to register u/s 25 of the Companies Act. Clause No. 7 of the said letter/order is material and reads as under:-

"(7) that no alteration shall be made to the Memorandum of Association or to the Articles of Association of the company, which are for the time being in force, unless the alteration had been previously submitted to and approved by the Central Government."

18. It is thus, clear that the Articles of Association of the defendant No. 1 were not only approved by the Government of India but, such approval was incorporated in the terms of the licence itself. Furthermore, no amendment to the Articles of Association was permitted unless a prior permission of the Central Government was obtained.

19. The company did intend to amend its Articles of Association regarding the strength of its Board. The company therefore, by a letter dated 16th October, 1997 requested for permission of the Central Government for the amendment. It proposed to amend the strength of the managing committee by adding one more member (director). The Regional Director exercising the powers of the Central Government by his letter dated 2nd February, 1998 granted approval to the Articles subject to two conditions. On request by the company made by letter dated 11th April, 1998 and after a long correspondence, by a letter dated 16th October, 1996 the Regional Director deleted the two conditions subject to which the approval was granted. This shows that the Central Government had meticulously read the Memorandum of Association and Articles of Association and after reading all the conditions including Article 41 and had granted licence u/s 25. Even at the time of modification, the Government was careful to impose certain conditions which were deleted when it was convinced that the conditions were unnecessary. The Memorandum of Association and the Articles of Association of the company have been referred to and approved in the licence itself. Approval to clause No. 41 (C) of the Articles of Association, by necessary implication, amounts to grant of exemption from application of Section 255 of

the Companies Act, to the extent of repugnancy between the two. It is not disputed that under Sub-section 6 of Section 25 of the Act, the Central Government has the power to grant such exemption. In view of this, it was not necessary for the defendant No. 1 company to follow the provisions of Section 255 and 256 of the Act regarding electing all directors at every General Meeting, or to provide for retirement of 1/3rd of its directors at each Annual General Meeting.

20. It must be clarified that Section 25(6) of the Act, 1956 does not per se exempt a company licenced u/s 25 from the provisions of the Act, in general or Section 255 and 256 in particular. In the normal circumstances, the exemption from any of the provisions of the Act, must be stated expressly in the terms of the licence. The normal rule that the Act would override any contrary provisions in the Memorandum of Association or Articles of Association would apply to cases of repugnancy between the Act and the Memorandum of Association or the Article of Association. The provisions in the Memorandum of Association or Articles of Association of a company which are contrary to any provisions of the Act would to the extent of repugnancy be void. However, it is permissible for the Central Government to grant exemption either generally or specifically to a particular company from one or more of the provisions of the Act under Sub-section (6) of Section 25 of the Act. Such exemption as stated earlier should normally be express. Courts would not inclined to cull out the implied exemption. In rare cases, however, exemption would be required to be inferred by necessary implication. For example where any provision in the Memorandum of association or Articles of Association of a company is so repugnant to the Act, that the two cannot co-exist and where the terms of the licence granted u/s 25 of the Act specifically require the company to follow the Memorandum of Association or Articles of Association as sanctioned by the Government and further prohibits any modification thereof without previous approval of the Government then the company would be in difficulty for, if it follows the Act it would violate its Memorandum of Association or Articles of Association and if it follows the Memorandum of Association and the Articles of Association it would violate the provisions of the Act. In the present case, the defendant No. 1 company is placed with such a situation that if it follows Section 255 of the Act, it would be committing a breach of Article 41 (C) and consequently breach the conditions of licence granted to it and if it follows Article 41 (C), it would be violating Sections 255 and 256 of the Act. Therefore, in the present case, it will have to be held that the respondent No. 1 company has been exempted from the application of Section 255 and 256 of the Act (to the extent of holding election of all or 1/3 of the directors every year) by necessary implication. Hence, the first contention of the learned counsel for the appellant is also rejected.

21. The learned counsel for the appellant did not point out any other illegality in the election of the directors/members of the managing committee of the company. No other point was canvassed by the appellant's counsel. Appeal is therefore dismissed, but in the circumstances of the case without any order as to

costs.