
(1989) 01 DEL CK 0051
In the Delhi High Court

D. Ross Porter

APPELLANT

Vs

Pioneer Seed Co. Ltd.

RESPONDENT

Date of Decision : 18-01-1989

Acts Referred:

Companies Act, 1956 — Section 313

Citation : (1990) 68 CompCas 145

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

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. I have heard arguments for deciding the application. The plaintiff, who is one of the directors of the defendant-company, has filed this suit seeking a decree for a declaration to the effect that the defendant-respondent has no power to reject and/or refuse the appointment of Mr. Brij Anand as an alternate director to the plaintiff and in the alternative a decree for a declaration that the rejection of Mr. Brij Anand as an alternate director to the plaintiff is wholly illegal, invalid, arbitrary and for a declaration that the resolution passed by the board of directors of the respondent in October, 1988 in this respect is illegal and invalid and a relief of mandatory injunction in sought requiring the respondent to appoint Mr. Brij Anand as alternate director to the plaintiff. Along with the suit, the plaintiff had moved an application under order XXXIX rules 1 and 1 read with section 151 of the CPC seeking an interim injunction restraining the respondent from implementing the decision taken in any resolution passed in the meeting dated October 24, 1988, and requiring the respondent-company to ensure that the plaintiff is duly represented on the board's meetings through Mr. Brij Anand.

2. Facts leading to the filing of the present suit and the application, in brief, are that M/s. Pioneer Hi-bred International Inc. USA (hereinafter referred to as the "PHI") is stated to be engaged world-wide in the business of research and development, production and sale of hi-bred seeds of various agricultural crops produced by the crossing of proprietary inbred lines developed though its

research and development efforts. This business is stated to be in existence for the last 62 years and M/s. Pioneer Overseas Corporation (hereinafter referred to as "POC") is said to be a subsidiary company of PHI. plaintiff is the attorney and is also Assistant General Counsel to PHI and is director of the respondent. The respondent-company was incorporated on February 28, 1987, with the object to develop, grow, raise, process, buy and sell, export, import and deal in all kinds of seeds. The authorised capital of the respondent was stated to be Rs.30 lakhs of which the subscribed capital was only Rs.5 lakhs. PHI holds 2,000 shares of the face value of Rs.100 each while Dr. Surinder M. Sehgal holds 1,000 shares and Mrs. S. Kapoor is stated to be holding 1996 shares and the remaining four shares are held by others. It is alleged that Dr. Surinder has transferred his entire shareholding in favor of one M/s. Asia Investment Inc., a company wholly owned by Dr. Surinder. Till March 8, 1988, Dr. Surinder was the Vice President of PHI and President of POC. Mrs. Kapoor is the sister of Dr. Surinder. According to Indian laws, PHI could not hold more than 40% shares in the respondent. It is the case of the plaintiff that since the inception of the respondent it is PHI which has incurred the expenses for research activity, technical assistance and has also allowed use of its secret technology and its processes for producing hi-bred seeds and also arranged for training the managerial staff of the respondent free of cost. It is also mentioned that, vide agreement dated July 31, 1979, PHI had provided technical assistance and advice including new developments, practices, techniques to the respondent as were available to the PHI to develop hi-bred varieties of corn, sorghum and millet seeds. According to the plaintiff, under the said agreement, the PHI has provided to the respondent basic breeding material and standard in-bred lines of the seed grains and at all material times the said genetic material was and is the property of PHI. Then reference is made to certain agreements dated September 1, 1978, March 8, 1981 and July 21, 1986, by which the PHI and POC provided to the respondent invaluable research information, materials know-how and rendered all services and assistance associated therewith without any payment and it was provided in the agreements that the breeding material, genetic material, inbred lines, the results, the data and the information arising out of and connected with performance of the said agreements would be owned by PHI and POC at all material times. So, in this way, it is alleged that the PHI had funded the entire research activity and programmes of the respondent which come to the tune of Rs.2,09,34,682 and by virtue of the agreement dated July 21, 1986, PHI had advanced one million US dollars to the respondent to set up, upgrade and modernise its research and other facilities. The said amount is stated to have been advanced without any security and on a non-reparable basis which was to be adjusted against the future cost of research incurred on behalf of PHI. PHI is also stated to have given critical plant and machinery of the value of Rs.10,55,568 free of cost. The respondent is stated to be owing Rs.44,40,150 as on June 30, 1987, on export advance against future exports to be made by the respondent. So, it is averred that PHI has invested crores of rupees in the respondent and has vital stakes in the conduct of the business of respondent in India. It is alleged that prior to the

disputes and differences, the business of the respondent was being professionally run, managed and controlled by PHI and as Dr. Surinder was Vice President of the PHI and President of POC, he was also looking after the interest of PHI in the respondent till March 1988, when he ceased to be connected with PHI and POC as there arose some disputes between him and PHI. Then, reference is made to the four additional directors being appointed to the board of directors of the respondent vide resolution dated April 22, 1988, which appointment is stated to be challenged by way of a company petition.

3. It is averred that the plaintiff admittedly being a resident of USA, it was not possible for him to visit India frequently and/or every three months to attend and participate in the board's meeting of the respondent. Then, making reference to article 18 of the articles of association of the respondent and section 313 of the Companies Act, it was averred that the plaintiff has a right to nominate an alternate director for attending the meeting of the board and thus, the plaintiff nominated Mr. Brij Anand as his alternate director under the said provisions. It was pleaded that the respondent was bound to accept the said nomination but in the alternative, it is pleaded that the discretionary power vested in the respondent in accepting or not accepting the said nomination has to be exercised in a bona fide manner and in the present case the respondent had rejected the nomination on ulterior grounds in a mala fide manner and that act of the respondent is bad in law. Then, in the plaint, reference is made to the dispute regarding the accounts of the respondent being audited by M/s. R.P. Malhan & Company. In the plaint it was mentioned that the main reason of the plaintiff's inability to visit India is that the apprehends that false and frivolous criminal cases would be instituted against him at the behest and instructions and/or by Dr. Surinder and Mrs. Kapoor, It is pleaded that the respondent is falsely alleging that the plaintiff and others have committed thefts of the material belonging to the respondent and had criminally misappropriated certain property of the respondent and committed criminal breach of trust. It is pleaded that, vide letter dated October 31, 1988, the solicitors of the respondent have communicated the reasons for refusing to appoint Mr. Brij Anand as alternate director. It has been mentioned that Mr. Anand has competitive interest as he is a director of Regency Magnetics Private Limited and is also a shareholder in PHI Biogene Limited. It is pleaded that the plaintiff has a similar interest in the said two companies as Mr. Brij Anand and if there cannot be any legal objection to the plaintiff, being a director, for attending the meetings of the board of the respondent there could be no justifiable reason for not allowing Mr. Brij Anand to attend the meetings as alternate director of the plaintiff.

4. The suit as well as the application are hotly contested by the defendant-respondent. It has been pleaded that there is no mandatory requirement of law that the respondent is bound to accept the nomination of alternate director by one of its directors. It is pleaded that in fact, the respondent had the complete power to reject the appointment of alternate director. In the alternative, it is pleaded that the conduct of the plaintiff qua the defendant-company since March

17, 1978, disentitles the plaintiff to appoint any alternate director as he has been responsible for removing the genetic material and research data unauthorisedly belonging to the defendant; and plaintiff and his constituted attorney procuring breaches of contract and lured the employees of the defendant-company and made them join their own company, Regency Magnetics Private Limited and Mr. Brij Anand had signed letters of appointment of such employees and there is a complete conflict of interests between the plaintiff and Mr. Brij Anand on the one hand and the defendant-company on the other hand. It is also pleaded that there are serious charges of misconduct against the firm of auditors with which Mr. Brij Anand is stated to be associated.

5. One of the pleas taken is that the plaint has not been signed, verified and instituted by any duly authorised attorney of the plaintiff and thus, the plaintiff cannot get any relief in this application on this score as well prima facie, it is clear that PHI has been instrumental in setting up the respondent-company and PHI has huge stakes in the investment made in the respondent-company. It is true that a particular director is not supposed to represent any particular shareholder, yet the facts of the particular case cannot be lost sight of when it is to be kept in view that PHI holds 40% share in the respondent-company and has financed the respondent-company from its funds which run into crores of rupees and thus, it cannot be said that PHI cannot protect its interests in the respondent-company by seeing that the plaintiff, who is almost representing the interests of PHI, should participate in the meeting of the board of the respondent. It is true that neither u/s 313 of the Companies Act nor under article 18 of the articles of association of the defendant-company, it has been made mandatory that the board of directors of the company are bound to accept the nomination of alternate director. It is the admitted case that in view of article 18 of the articles of association of the defendant-company, no alternate director could be appointed till he is nominee of one the directors but the converse, prima facie, appears to be not correct that if a particular director nominates his alternate director then the board of directors is bound to accept the said nomination. It is also, indeed, not in dispute that if a particular director fails to attend a certain number of the meetings of the board of directors, then, in law, he ceases to be director.

6. Counsel for the plaintiff has cited Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Case 743 (SC), where it has been observed that what is necessary to bear in mind is that such discretionary powers in company administration are in the nature of fiduciary powers and must, for that reason, be exercised in good faith. It was observed that mala fides vitiate the exercise of such discretion. He has also made reference to Alak Prokash Jain v. Union of India [1973] 43 Comp Case 68 (Cal), where u/s 388B of the Companies Act, the Central Government is empowered to make a reference. It was held that ordinarily the word "may" implies a discretion and it confers a power to do something which would otherwise be illegal but there are other matters which are to be considered in construing the meaning of

the word "may" such as the conditions under which the power is to be exercised, the claim or the right of the persons for whose benefit the power is to be exercised and the purpose of the statute for which the power is to be exercised. It was held that these are the conditions which couple power with duty and make it obligatory on the person in whom power is vested to exercise that power when called upon to do so. Counsel for the respondent on the other hand, has made a reference to Life Insurance Corporation of India v. Escorts Ltd. [1986] 59 Comp Case 548 (SC), in support of his contention that the board of directors has absolute power to appoint the director and is not bound to give any reasons. I think, in the present case, for deciding the application for grant of interim injunction, it is not necessary to give any considered opinion on the respective contentions being raised by the parties. It is obvious that in case the defendant has rejected the prayer of the plaintiff for appointment of alternate director for mala fide reasons, then the said act of the defendant cannot be sustained. The reasons which were given by the defendant to the plaintiff before filing of the suit for rejecting the request of the plaintiff for appointment of alternate director were such as would hold good even against the plaintiff acting as a director. Learned counsel for the defendant has drawn my attention to Palmer's Company Law, para. 63.13 and Gower's Company Law, Chapter 24. I have gone through them and find that they pertain to the fiduciary duties of a director and the present is not a case where this court is to give a finding whether the plaintiff is entitled or not to continue as a director of the defendant-company. The question is whether the plaintiff, who admittedly is one of the directors of the defendant-company, could pray for appointment of an alternate director and whether such prayer of the plaintiff has been rejected by the defendant-company in a bona fide manner. The plaintiff holds similar interest in the companies, which, according to the defendant, have been set up in competition with the business of the defendant, as his nominee. So, on that ground, the defendant could not possibly reject the prayer of the plaintiff for appointing Mr. Brij Anand as alternate director. In the reply and the written statement, certain new facts have been given by the defendant for justifying its resolution for rejecting the prayer of the plaintiff for appointing Mr. Brij Anand as alternate director, but the fact remains that the employees whose letters of appointment are stated to have been signed by Mr. Anand are employed in the companies in which the plaintiff as well as Mr. Brij Anand have interest and if the plaintiff could not be debarred from being director of the defendant-company to attend the meeting of the board of directors of the defendant, it is not understood as to how, on the same reasons, his request for nominating Mr. Brij Anand as alternate director could be rejected.

7. It is only when evidence is led, it would come out whether the said two companies set up by the plaintiff and Mr. Brij Anand have any competitive interest with the defendant. The plaintiff appears to have a prima facie case in his favor and the balance of convenience also appears to be in favor of the plaintiff because if the plaintiff's alternate director is not appointed, the plaintiff may cease to be a director due to his inability to come to India often enough.

The plaintiff has given some reasons for his inability to come to India. It cannot be said that the plaintiff wants to escape any criminal liability or wants to be away from any criminal justice of this country by his expressing apprehensions that he may be involved in false criminal cases if he was to come to India. As yet the plaintiff has not been summoned by any criminal court so as to give any finding that the plaintiff is avoiding any criminal justice in this court. Irreparable harm is likely to be caused to the plaintiff if he is not allowed to nominate an alternate director as he might cease to be a director on his not attending the board meeting for three months. The Indian Companies Act provides for service of notice on the director in India only. The plaintiff not being resident of India may not even get the notice of the board of directors. So, keeping all these facts in view, the interests of justice require that a temporary injunction should be granted in favor of the plaintiff.

8. The question whether the power of attorney has been duly stamped would be decided later on because there is still time left for the plaintiff to get it stamped in India.

9. I allow the application and direct the respondent to accept Mr. Brij Anand as alternate director in place of the plaintiff to enable him to attend the meeting of the board of directors of the defendant. This injunction shall continue till the disposal of the suit. Anything said in this judgment shall not prejudice the case of the parties which shall be decided on merits after the parties have led evidence.