

(1979) 08 DEL CK 0009

In the Delhi High Court

Case No : Civil Writ Petition No. 668 of 1977

Dalmia Cement (Bharat) Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 29-08-1979

Acts Referred:

Citation : (1979) 08 DEL CK 0009

Hon'ble Judges : S.S. Chadha, J

Bench : Single Bench

Advocate : G.L. Sanghi and R.K. Sanghi, for the Appellant; K.N. Kataria and Padam Saxena, for the Respondent

Final Decision : Allowed

Judgement

S.S. Chadha, J.—This petition under Article 226 of the Constitution seeks a writ of certiorari quashing the orders of the Central Govt. declining to accord approval under the provisions of Sections 204A and 314(1B) of the Companies Act, 1956.

2. An interesting question with reference to the scope and effect of Section 204A of the Companies Act (hereinafter referred to as "the Act") has arisen for consideration as a case of first impression. The Companies (Amendment) Act, 1969, abolished the system of management of companies by managing agents or secretaries and treasurers with effect from April 3, 1970. It was later noticed that many erstwhile managing agents or secretaries and treasurers were trying to circumvent the provisions of law abolishing those systems of management by trying to continue their control over the managed companies by entering into service agreements in various forms like secretary, consultant, or adviser or other such names. The legislature, then, considered in its wisdom to provide for scrutiny and regulation of such agreements to prevent their continuing control. Section 204A was added in the Act which conferred a power on the Central Govt. to regulate arrangements which have been or may have been entered into between the former managing agents or secretaries and treasurers or any associate of the managing agents or secretaries or treasurers. Section 204A

reads as under :

"Restrictions on the appointment of former managing agents or secretaries and treasurers to any office-

(1) Except with the previous approval of the-

(a) company in general meeting, and

(b) Central Government,

no company shall during a period of five years from the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), appoint as secretary, consultant or adviser or to any other office, by whatever name called-

(i) any individual, firm or body corporate who, or which, had at any time after the 15th day of August, 1960, been holding office as the managing agents or secretaries and treasurers of the company, or

(ii) any associate of the managing agents or secretaries and treasurers as aforesaid :

Provided that where any such appointment has been made before the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), no such appointment shall be continued by the company after a period of six months from such commencement unless such appointment has been approved by the company in general meeting and the Central Government before the expiry of the said period.

(2) (a) Where-

(i) any individual, firm or body corporate, who, or which, had at any time after the 15th day of August, 1960, been holding office as the managing agents or secretaries and treasurers of the company, or

(ii) any associate of the managing agents or secretaries and treasurers as aforesaid ;

has been appointed by such company at any time during a period of five years preceding the 3rd day of April, 1970, or at any time after that date, as its secretary, consultant or adviser, or to any other office under it, by whatever name called, the Central Government may, if it appears to it that there is good reason for so doing, require the company to furnish to it such information as it may consider necessary, with regard to the terms and conditions of the appointment of such individual, firm or body corporate as secretary, consultant or adviser or as the holder of such other office, for the purpose of determining whether or not such terms and conditions are prejudicial to the interests of the company.

(b) If the company refuses or neglects to furnish any such information, the Central Government may appoint a competent person to investigate and report

on the terms and conditions of appointment to any of the offices referred to in Clause (a) and the provisions of Section 240A shall, so far as may be, apply, to such investigation, as they apply to any other investigation made under any other provision of this Act.

(c) If, after perusal of the information furnished by the company, or, as the case may be, the report submitted by the person appointed under Clause (b), the Central Government is of opinion that the terms and conditions of appointment to any of the offices referred to in Clause (a) are pre-judicial to the interests of the company, it may, by order, make such variations in those terms and conditions as would, in its opinion, no longer render such terms and conditions of appointment prejudicial to the interests of the company.

(d) As from such date as may be specified by the Central Government in the order aforesaid, the appointment referred to in Clause (a) shall be regulated by the terms and conditions as varied by that Government.

(3) For the purposes of this section, the expression "appointment" includes re-appointment, employment and re-employment."

3. Dalmia Cement (Bharat) Ltd. (hereinafter referred to as "the company") proposed to appoint one Shri J.H. Dalmia as an executive director of the company. He is an associate of the company's erstwhile managing agents, Hari Brothers Private Ltd., and is also a relative of Shri M.H. Dalmia, one of the directors of the company, being his brother. A special resolution under Sections 204A and 314(1B) of the Act was passed at the 23rd annual general meeting of the shareholders of the company held on May 2, 1975. The shareholders accorded their approval under Sections 204A and 314(1B) and other applicable provisions of the Act for the appointment of, and for the holding of the office of profit by Shri J.H. Dalmia as an executive director of the company. The petitioners then made an application on May 8, 1975, to the Central Govt. under the provisions of Sections 204A and 314(1B) of the Act for according approval. By the first impugned letter dated July 29, 1975, the proposal of the company was rejected. The reason advanced for the rejection is that the company is already having a large number of executive directors. The petitioners represented against this decision. The representation was rejected by the second impugned order dated May 1, 1976. On a further representation, the Central Govt. reconsidered the matter but expressed in the third impugned letter dated February 21, 1977, its inability to accede to the request of the company. A petition for revision filed by the company was rejected by the Central Govt. in the fourth impugned letter dated September 7, 1977. Two reasons for not granting the approval are decipherable from the impugned letters, namely :--

(i) that the company is already having a large number of executive directors at high salaries from the same family ;

(ii) that it will not be either in the interests of shareholders generally or in public interest to approve the appointment as executive directors on high salaries of too

many members of the same family in one company.

4. Though no affidavit-in-opposition to the writ petition has been filed in spite of several opportunities, yet the affidavit at the stage of interim relief also gives the reasons for declining the approval by the Central Govt. It is deposed there that " Shri J.H. Dalmia was an associate of the former managing agents, i.e., M/s. Hari Brothers Private Ltd. and a relative of Shri M.H. Dalmia, an executive director of the company. Besides, the company is having a large number of executives at high salaries from the same family and hence in exercise of the discretionary powers under the Act, the respondents thought that the approval of the appointment was prejudicial to the interest of the company, general public and to the shareholders particularly those shareholders who do not belong to the family of Dalmia".

5. The first submission of Shri G.L. Sanghi, the learned counsel for the petitioners, feebly advanced is that the provisions requiring approval of the Central Govt. u/s 204A are ex-facie discriminatory and unconstitutional being violative of Article 14 of the Constitution. The contention is that the power of the approval would depend upon the whim or caprice of the person occupying the relevant office in the Department of Company Affairs of the Central Govt., for, it would permit grant of approval in one case and refusal of the approval in another depending entirely on personal and not objective considerations. There is no merit in this submission. The law is fairly settled that an Act cannot be questioned as violating Article 14 of the Constitution merely because it confers a certain amount of discretion on the executive and such discretion lends itself, in practice, to be exercised in a discriminatory manner. The discretionary power is not necessarily discriminatory. The possibility of the power being abused does not negative the existence of the power. The legislature has laid down and indicated the standard for the guidance of the Central Govt. in considering the applications submitted to it u/s 204A of the Act. The legislature has not conferred any absolute or naked or arbitrary power but has controlled it by directing the Central Govt. to consider whether the terms and conditions of appointment are prejudicial to the interests of the company or not. The discretion vested in the Central Govt. is sound discretion guided by law, i.e., in the interests of the company or its shareholders. The power has been conferred on the Central Govt. to regulate arrangements between the former managing agents or secretaries and treasurers of the company or their associates in order to ensure that such arrangements are in the interests of the company. As there is sufficient indication of the policy and object of the legislation for the guidance of the Central Govt., the validity of Section 204A cannot be questioned under Article 14 of the Constitution.

6. The second submission of the learned counsel is that the impugned decision is not in conformity with the true intent and purpose of the relevant provisions of the law empowering the Central Govt. to grant approval, and is thus without jurisdiction. I may briefly recall the provisions. Section 204A(1) lays down that

where any individual, firm or body corporate held the office of the managing agents or secretaries and treasurers of the company at any time after 15th August, 1960, no such individual, firm or body corporate or any associate of the managing agents or secretaries and treasurers can be appointed as secretary, consultant or adviser or to any other office under the company during a period of five years from the commencement of the Companies (Amendment) Act, 1974 (notified as from February 1, 1975), except with the previous approval of the company in general meeting and the Central Govt. The effect of Section 314(1B) is that a new appointment of a relative of a director carrying remuneration of Rs. 3,000 or more per month requires consent of the company by a special resolution and approval of the Central Govt. A special resolution under Sections 204A and 314(1B) of the Act was passed at the 23rd annual general meeting of the shareholders of the company held on May 2, 1975. A copy of the resolution is on the record. The consent of the company is thus accorded under Sections 204A and 314(1B) of the Act to the appointment of, and for the holding of the office of profit by Shri J.H. Dalmia. The question only remained of the approval of the Central Govt. under Sections 204A and 314(1B), for which an application was made on May 8, 1975. The guideline laid down for considering such an application is to see whether the proposed appointment is or is not prejudicial to the interests of the company.

7. Factual averments have been made in the writ petition supported by an affidavit to this effect. The company is a widely held public limited company, having about 10,000 shareholders, about 11% of the shares of which are held by nationalised insurance companies, nationalised banks, Unit Trust of India and other financial institutions. Since January, 1970, the company had four executive directors looking after different divisions and activities which have contributed to the satisfactory working results of the company. One of such executives, Shri A. H. Dalmia, designated as assistant executive director, resigned from the services of the company with effect from August 1, 1975, and the general manager (operations), a senior technical executive, the manager (iron ore division) and the general manager (marketing) were already under superannuation and are on extension at present. It was under those circumstances and in view of the impending resignation of Shri A.H. Dalmia that the shareholders of the company passed a resolution to appoint Shri J.H. Dalmia as executive director with effect from August 1, 1975, subject to the approval of the Central Govt. The qualifications and the specialised knowledge of Shri J.H. Dalmia is also stated in the writ petition in great detail. In fact it has been mentioned that the notification dated September 17, 1976, issued by the Govt. of India, Ministry of Industry, clearly shows that the Central Govt. itself has endorsed the capacity and special knowledge of Shri J.H. Dalmia by appointing him a member of the All India Development Council for the cement industry.

8. The impugned decision has to be viewed in the background of these facts. The Central Govt. does not say that the requisite qualifications and experience of Shri J.H. Dalmia do not justify his appointment to the office of the executive director.

The shareholders of the company have approved and given their consent for the appointment and the opinion of the shareholders of the company in the general meeting expressed the need of the services of the qualified person whom they proposed to appoint. The object of Section 204A is to prevent erstwhile managing agents or secretaries and treasurers or their associates to continue their control and management of the company and to provide for scrutiny and regulation of service agreements by the Central Govt. in order to ensure that the appointments are in the interests of the company and are not a mere device to circumvent the provisions of the Act. This power of scrutiny and regulation could be exercised on grounds germane and relevant to the provisions under which the approval was sought. The Central Govt. was entrusted with the discretion to approve or disapprove, but it had to direct itself properly in law. The Central Govt. had to exercise its discretion lawfully by inviting its attention to all relevant matters to come to the conclusion whether or not the proposed appointment is with the object of continuing control over the company. As the Central Govt. has not called its attention to this matter which it was bound to consider, the impugned decision is bad in law.

9. The object of Section 314(1B) is to see that the moneys of the company are not siphoned into the pockets of the relatives of the directors without such persons being otherwise competent to fill the office or without rendering real services to the company. The reason advanced in the impugned letters is that the company has a large number of executive directors at high salaries from the same family. The factual position on the record is that the company has had four executive (and assistant executive) directors from the same family since January, 1970, with the approval of the shareholders pursuant to the provisions then existing. One of the assistant executive directors, namely, Shri A.H. Dalmia, was continued up to 31st July, 1975, with the approval of the Central Govt. u/s 314(1B). The application of the company for the approval of the appointment of Shri J.H. Dalmia with effect from August 1, 1975, was a continuance of the arrangements of having four executive (including assistant executive) directors from the same family. The Central Govt. has not come forward with any material or justification either in the affidavit-in-opposition to the writ petition or by production of the original records as to how it is against the interests of the shareholders to continue to have four executive directors from one family when the company was having such four executive directors since January, 1970. So far as Shri J.H. Dalmia is concerned, the Govt. of India itself has recognised his ability by incorporating him as a member of the development council for cement industry. He had the necessary qualifications, experience as a senior executive, particularly in cement industry. He was working with M/s. Orissa Cement Ltd. as their executive director from January 1, 1970, till July 31, 1975. M/s. Orissa Cement Ltd. had requested for the approval of the Central Govt. for his appointment up to July 31, 1975. The Central Govt. had granted approval up to July 31, 1975, almost on the same terms which were offered by the petitioner-company. The Central Govt., Therefore, misdirected itself in law in declining the

approval sought for.

10. During the pendency of the writ petition the following arrangements were made :

"1. The company is allowed to pay Shri J.H. Dalmia an interim allowance of Rs. 2,000 per month with effect from 1st August, 1975, till February 28, 1978.

2. The company is allowed to pay Shri J.H. Dalmia an interim allowance of Rs. 2,000 from 1st March, 1978, plus perquisites as set out in the special resolution dated May 2, 1975.

3. Shri J.H. Dalmia through his counsel, Shri S. R. Aggarwal, gives an undertaking to this court that in case the writ petition is dismissed, Shri J.H. Dalmia shall restore the entire benefits to the company.

4. Shri V.H. Dalmia, one of the directors of the company, is also present in the court and gives an undertaking that in case Shri J.H. Dalmia fails to restore the benefits received by him, Shri V.H. Dalmia will restore the same to the company and he will be personally liable for the same."

11. This arrangement should be taken note of while considering afresh the application of the petitioners.

12. The result of the above discussion is that the writ petition succeeds. The impugned letters are quashed. The Central Govt. will reconsider the application of the petitioners in accordance with the observations contained in this order and in accordance with law. On the facts and circumstances of the case, I make no order as to costs.