
(1984) 05 DEL CK 0044

In the Delhi High Court

Case No : Company Appeal No. 13 of 1983

Dineker Rai D. Desai and others

APPELLANT

Vs

R.P. Bhasin and others

RESPONDENT

Date of Decision : 09-05-1984

Acts Referred:

Citation : (1986) 60 CompCas 14

Hon'ble Judges : D.P Wadhwa, J;D.K. Kapur, J

Bench : Division Bench

Judgement

D.K. Kapur, J.—Company Petition No. 58 of 1979, which is a petition u/s 397 and 398 of the Companies Act, 1956, is pending before the company judge. Company Application (C.A. No. 111 of 1983) was moved by the petitioners seeking directions regarding the year ending March 31, 1982. The application was filed on February 7, 1983. It was claimed in the application that the existing executive committee of the company became functus officio on September 30, 1982, and could not legally function beyond that date. The annual general meeting had already been delayed and it was prayed that certain articles and rules should be changed or amended to bring about a fair and legal meeting and elections. It was also prayed that the register of members should be corrected first and bogus members be removed. Furthermore, it was claimed, the elections should be held under the supervision of the court with an impartial and independent chairman.

2. This application was decided on July 22, 1983, by the impugned order. The appellants have challenged the various directions made in the order as well as the changes made in the articles of association and election rules of the company.

3. It must here be stated that disputes relating to the motion pictures association have been before the court almost continuously since the year 1973 and various orders company judges have been passed during the pendency of these petitions and other proceedings before the company court regarding the holding of the annual general meeting. The order under appeal is, however, somewhat different from orders made in the past, because in the past, either directors have been

appointed to the company or an observer, has been appointed regarding the meeting. In the present case, a committee has been appointed to hold the elections and also drastic changes have been made in the election rules and also the method of elections, which have been challenged on various grounds before us on the footing that the court cannot depart from the Companies Act with regard to the holding of the annual general meeting and also complaining that the election procedure cannot be changed so as to deprive a number of members of their right to stand for elections, and also, complaining that the elections are almost impossible to be held under the directions made by the company court.

4. It must here be said that the court has not been very successful regarding the conduct of elections in the past. The company petition has been pending from 1979 and notwithstanding the orders of the Supreme Court passed in 1982 that the case should be heard day to day and decided in two months, it is still far from a decision even in 1984. At the same time, it appears the subsequent elections and the annual general meeting and so on are also under challenge in various sub-proceedings. It is, Therefore, imperative to re-think over this matter in a practical manner rather than create a situation in which every election is liable to be challenged in proceedings before the company judge, thus making it possible to decided the main petition.

5. Now, the various alterations made by the company judge in the order under appeal can be set out and analysed. The court has given its reasons in one order and then, as two sub- annexure to this order, has given directions regarding the holding of the meeting and changes to the election rules.

6. It is necessary now to analyze the directions first. It is stated therein that the elections were to be held on May 30, 1983, but in view of the changes in the election rules and procedure, the same have been postponed. The actual dates and programme have now to be decided by the committee appointed by the court. The court has then appointed three persons, namely, Shri Shyam Behari Mehra, Shri K. M. S. Khan and Shri R. K. Kaul, Joint Registrar, of this court, to be the committee of which Shri R. K. Kaul is to be the chairman with a casting vote. The committee can take assistance of other officials of the court. The elections are to be conducted by this committee at Delhi, Kanpur and Allahabad. The dates for voting have to be decided by the committee. Before the elections can actually be held, the voters' list is to be correctly made to represent the membership. An authenticated list of members is to be prepared and objections invited. The list is first to be corrected up to January 12, 1982, and then a separate list made of persons who have become members after that date and objections also invited to that list. Members who are in arrears of subscription are required to make up their deficiency and elections to be conducted in accordance with the election rules as amended by the court. Though these directions may appear innocuous, they are actually drastic departures from the Companies Act and it is difficult to see how this committee can hold the annual general meeting at three places under the Companies Act.

7. The next set of directions in the judgment are the amendments to the election rules. The changes are with regard to how a representative of a company or a representative of a partnership firm can vote or stand for election. According to the first amendment, such representatives can stand for election, but this was not permitted under the existing election rules. The second amendment is that the authorisation to the representatives of firms or companies should be in the prescribed form and a copy of the resolution of the firm or company should be sent to the association. The third amendment is that annexure II to the articles of association is deleted. The fourth amendment is that no person, who has been a member of the executive committee for two years is entitled to contest unless there is a gap of one year. The fifth amendment is the natural persons cannot vote more than once. The sixth amendment is that a firm can be a candidate and the seventh amendment is that a director, secretary or manager of a company can be a candidate. The next amendment is that the elections should be held at three places, Delhi, Kanpur and Allahabad. The last amendments that any provisions of the articles of the company or election rules inconsistent with these amendments will stand amended.

8. In order to understand these amendments, it is also necessary to understand the set up of the company. The company can have as its members, natural members, company members and partnership firm members. These persons must either be exhibitors or distributors of motion pictures in Delhi or Uttar Pradesh. There are various provisions in the articles as to how a person ceases to be a member. In order to continue to be a member, the member must have a cinema or a film for distribution. There are also other provisions for debarring a members such as failure to pay subscription or failure to pay the dues. As the motion pictures business is a continuous one and, sometimes, a hazardous one, it happens that persons who own cinemas will sell them, or persons who have the distribution of films go out of business, either on failure, or due to transfer of the business. There is, Therefore, a continuous influx of new members and outgoing of old members. This is bound to happen because of the nature of the business. At the same time, there can be changes in partnership firms brought about by retirement, death, dissolution and so on. The voting rights of the members are also fixed by the articles and election rules. No proxy voting is allowed. In the case of natural members, the member must be present in person. In the case of the company members, the person voting must be authorised by a resolution of the company as provided by section 187 of the Companies Act. There is no difficulty about such persons. The difficulty is about partnership firms which are not normal members and companies as they are not legal persons for the purpose of holding shares. In this company, a partnership firm can be a member, and the question has arisen as to who can vote for such a firm and how. The procedure prescribed by the election rules is that all the members of the firm should jointly authorise one person to vote, who can then exercise the vote. The form for this is set out as annexure "E" to the existing election rules. It is an authorisation for a specific annual general meeting and

allows the authorised person to vote at the annual general meeting and also at the elections at that meeting. The amendment made by the court in Company Petition No. 32 of 1976 was that the secretary shall issue a letter of authorisation to partnership concerned to nominate a partner and all the partners should sign that authorisation letter. There is also a date fixed, i.e., 45 days before meeting when that letter is to be issued. There seems to be some difficulty in working out this annexure. We think the company judge is right in making a departure from this annexure. In order to make this matter specific, we would point out in the course of this judgment what we think should be the amendment.

9. The other changes made in the election rules are such that it is difficult to see how the elections can be held. For instance, rule 6 of the existing election rules provides that non-members or attorneys or agents or representatives of any type of member cannot be a candidate. According to the proposed changes, directors of companies, secretaries or managers can also be candidates. At the same time, members of firms are also debarred under the existing rule which is as follows :

"Partners of partnership firms, members and representatives of body corporate ,even though authorised u/s 187 of the Companies Act, 1956, cannot nominate or be nominated."

10. The purpose of the existing rule was to ensure that only persons who were members in their own right could be candidates and not person who were either partners or directors or employees or partnership firms or companies. We do not see why there should be any departure from the existing rules regarding who can stand for elections and none have been pointed out in the judgment. In fact, there is nothing about this in the application. We do not know why the company judge has differed from the existing rules regarding who can stand for election and become a member of the executive committee. As the rules stand at present, only natural members can stand and only natural members can nominate.

11. Then there is the question of voting. As far as the companies are concerned, there is no difficulty because all that the company has to do is to send its resolution u/s 187 of the Companies Act, 1956, regarding who is the person authorised to vote. This is also set out in annexure "F" to the election rules. The case of partnership firms presents special difficulty which will be dealt with later on in the judgment.

12. The next amendment is that a person who has been a member of the executive committee for two years is not entitled to contest without a gap of one year. This has been introduced because it appears that the counsel stated that an amendment of this type could be made on the lines of the Bar Association of the Supreme Court. We fail to understand how the Companies Act can debar a person from standing for elections, if he wants to. There has to be a specific decision of the members to introduce a special article to create such a bar. If a meeting of the company amends the article to this effect, it will be a moot point

whether the amendment will be valid. But, assuming it is valid, it must have the support of the requisite majority of the members. This is a drastic alteration of the democratic right of every member to stand for election. In the case of companies and partnership firms, the bar is created by the fact that the firm is the member and not the partner and in the case of the companies, the company is the member and not its director or manager. To explain this, section 187 of the Companies Act, 1956, has only to be referred to. It states that a body corporate whether a company under the Act or not can authorise such persons as it thinks fit to act as its representative at the meeting and such person can exercise the power of vote as if he was an individual member. This section is limited to companies and body corporate and does not apply to partnership firms. It, Therefore, comes about that a partner, who is a member of a firm which is itself a member, cannot stand for election and nor can a director or an employee of a company member. Any departure from this is a drastic change in the Companies Act and cannot be directed by the company judge. It is a legislative Act. The next amendment is that one person can only vote once, i.e., if he votes in his own right, he cannot vote for any partnership firm or any company. This amendment is understandable and seems to be inconsistent with the fact that a person can be a member in his own right and also a representative of a company or partnership firm. No partnership firm can vote except through a representative and the same applies to companies. This amendment is, Therefore, totally unnecessary and seems to be inconsistent with the articles and the election rules. The next two amendments regarding the authority of firm members to be candidates or company members to have their own directors, secretaries or managers as candidates has already been dealt with.

13. Coming to the two remaining amendments, namely, that the elections should be held at three places, Delhi, Kanpur and Allahabad and that the articles of association of the election rules inconsistent with the amendments shall stand amended, we think that the direction regarding the holding of the annual general meeting at three places cannot be given in law as it is inconsistent with the Companies Act, and this means that virtually all the proposed changes to the election rules have to be held to be unnecessary except the one relating to partnership firm members concerning which we will give separate directions.

14. It is now necessary to analyze the directions regarding the holding of the annual general meeting. These directions were challenged on a large number of points by learned counsel, but it seems unnecessary to analyze this matter too deeply as the scheme of the Companies Act is that there should be an annual general meeting each year at which the accounts are presented and are passed with or without modification, the report of the directors is presented, the auditors are appointed and the retiring directors are replaced by others. In most companies, only a few directors retire at the annual general meeting. In the case of this particular company, which is a section 25 company, all the executive members including the office bearers retire and have to be replaced by a new executive committee. In a company which has a share capital, the fate of the

elections is determined by a majority of the votes determined from the shareholding. Thus, even if there is one member owning a large number of shares, he can outvote every person holding lesser shares because each share has one vote. In a company, like the present, there is only one vote per member because there are no shares. Thus, the annual general meeting to be held under the Act has to include not only the elections of the new executive committee but also the other ingredients of an annual general meeting. Various provisions of the Companies Act, like sections 166, 167 and 168, indicate that the annual general meeting has to be held and the consequences of not holding it may be a criminal offence. Section 173 indicates that the annual general meeting has to have its normal business, the consideration of the accounts, the balance-sheet and reports of the board of directors and auditors, the declaration of dividend, the appointment of directors and the appointment of auditors. The appointment of directors has, Therefore, to be done at an annual general meeting and not otherwise.

15. The most important provision as far as the directions regarding the meeting are concerned are contained in sections 166(2) and 168 of the Act. Sub-section (2) of section 166 provides that the annual general meeting has to be called at a time or place during business hours on a day not being a public holiday and the meeting has to be held either at the registered office or at some other place within the same city, town or village where the registered office is situate. Thus, the annual general meeting has to be held at Delhi and cannot be held elsewhere. The direction regarding the meeting to be held at Delhi, Kanpur and Allahabad is, Therefore, invalid as far as the Act is concerned.

16. Then section 167 allows the Central Government to call the annual general meeting. This shows that the court has not been given any power regarding the annual general meeting. The only power of the court was to call a meeting u/s 186, but that was a meeting other than the annual general meeting. Even that power has been taken away by the Amendment Act of 1974. Thus, at present, the court has no power to hold an annual general meeting or even any other meeting of the company. On this ground, it is submitted that the directions of the court are ultra virus the Act. We would prefer not to go into this question because we do not think it necessary to direct that the meeting should be held at three places.

17. There are also other reasons for this. In the case of election for this particular company, there are no proxy votes allowed, so the members has to come in person or not to vote at all. The existing election rules show that the candidates and their representatives can object to the identity of the voters which has to be decided by the chairman of the meeting. This is rule 13. The chairman has to be an independent man as provided in rule 19. If the election is held at three places, the possibility of substitute voters, which is one of the problems, is likely to arise. As, in the case of any dispute, a reference to the records of the company may be necessary for purposes of identification, the

most convenient place to hold the meeting is at the registered office or at some other place where the records can easily be brought.

18. Then we have to refer to section 168 which provides for prosecution in case of delay in holding the annual general meeting. The directions of the court are that the meeting is to be conducted by three persons who are not directors. It is open to the court to appoint these three persons as directors of the company when they will be liable for the default, if any. We fail to understand how they can be made responsible for holding a meeting which under law has to be held by the existing board of directors. There are two possibilities. Either the executive committee as existing cannot hold the elections in which case an order has to be sought from the Central Government u/s 167, or it is the executive committee which has to hold the meeting, as they are the persons who are liable for any default u/s 168. It is, Therefore, essential that the executive committee should hold the elections. But, the court can make provision for the proper conduct of the election by nominating a chairman as visualised by rule 19. We think that we should replace the direction by appointing a person to be the chairman of the actual meeting as far as the election part is concerned as visualised by rule 19 of the election rules of the company. The chairman so nominated will take over after the other business of the annual general meeting has been completed for the purpose of the elections. We will also give directions regarding assistance to the chairman by the officials of the court.

19. Turning now to the question of settling the register of members and the voters list, we are faced with a formidable set of objections and a great practical difficulty in complying with the order passed by the company judge. The only purpose of the directions was to hold the meeting, i.e., the annual general meeting. The register of members of the company for past years is quite immaterial. An investigation into how persons have become members or have ceased to be members is an endless process. There are too many ways in which a person ceases to be a member, to justify investigation prior to the meeting and this is a too long drawn out process for holding an annual general meeting. We would, Therefore, be of the view that it is unnecessary for the committee to first make an investigation as to how many members have been removed from the membership. As the meeting has to be held within the statutory period, any delay is unjustified. The effect of the order has been continue the executive board for nearly a year because the meeting was to be held in May, 1983, and as a result of the directions, it has been unnecessarily postponed. We have examined the report submitted by the board which shows that 498 persons have been removed from the membership of the association and only 142 members have joined from January 13, 1982, to July 31, 1983. Also, the membership as on January 12, 1982, was 1,359. Also, 400 persons had applied for membership between January 1, 1975, to July 31, 1983, which are still pending. As far as persons who have not become members are concerned, we do not think anything can be done by the company judge. As far as the persons who have been removed from membership are concerned, they have every right to move the

court u/s 155 of the Companies Act. If each of these cases is investigated independently, we doubt that the result recorded by the committee would have any legal backing or would have the effect of bringing them back. When there is an express provision of law, namely, section 155, enabling the company court to rectify the register, only the court has to act under that section or it can refuse relief. But, a general power of this type cannot be handed over to a committee. It is a judicial matter as to whether a person has been rightly or wrongly removed from membership. None of those persons appear to have moved the court by way of a petition u/s 155 or by recourse to the civil court. We do not see why the court should make any investigation into this matter thus creating a lot of further complications in what would otherwise have been quite a simple procedure. We, Therefore, think that there is no purpose in the court trying to rectify the register of members on its own initiative by a procedure which is somewhat different to that laid down in the Companies Act.

20. This brings us to the question as to how the voters list has to be settled. There is a procedure laid down in the election rules of the company. This states in rule 18 that the register of members shall remain closed eight clear days before the holding of the annual general meeting and no person will be admitted to membership thereafter. This means that when the date of the annual general meeting is announced, more members can be enlisted or allowed to join till eight clear days before the date of the meeting. Normally, such persons would be entitled to vote at that meeting, so there is no purpose in settling the voters' list in advance.

21. Then there is rule 17, which states that the secretary of the company shall prepare a role of members entitled to vote. These persons will be all proprietary firm members in their own right giving the name of the member who is entitled to vote; the names of partnership firm members together with the name of the authorised partner in whose favor an authorisation has been given and, thirdly, the name of the authorised representative of company members in whose favor valid resolutions have been filed. Thus, the list consists of natural members and representatives, i.e., partners of firms who are entitled to vote and authorised members of company members. This rule further shows that persons in arrears of subscription are not included in the voters list.

22. So, the procedure visualised by the election rules is that the voters list will consist of members who are borne on the register of members which may consist of natural members, and partners of firms who have been authorised to vote. We see nothing wrong in this method of settling the voters list. It is designed to facilitate voting.

23. Now, we can visualise the worst situation that persons who are otherwise entitled to vote are removed from the voters list with a view to manipulate the elections. The chairman appointed by us will take into consideration any objection against wrongful removal from the voters list and allow the vote to be cast under objection separately if he thinks that there is some substance in the

allegation of wrongful removal. We will give directions in this respect at the end of the judgment.

24. In the result, all the directions and amendments to the election rules as given by the learned single judge are set aside except to the extent indicated above. But, directions have now to be given regarding : (a) a chairman to be appointed for the elections as discussed above, (b) the procedure to be adopted by him regarding persons wrongly removed from the voters list, and (c) regarding the election rules, an amendment has to be made to enable partnership firms and companies for casting their votes in accordance with the said election rules.

25. Taking up the amendment to the election rules first, the relevant rule is rule 10, which provides as follows :

"10. Who can vote :

A member of the association, who is :-

(a) the proprietor of a proprietorship firm member;

(b) Any one of the partners of a partnership firm member duly authorised by all other partners of such partnership firm to cast vote on behalf of the firms in writing, as per authority letter issued by the association in terms of annexure II of the articles of association passed by the Hon'ble High Court;

(c) the managing director or any one of the directors or the secretary or any other officer of a company member duly authorised under a resolution passed by the board of directors of the company-member concerned, in terms of section 187 of the Companies Act, 1956, to cast vote on behalf of the company-member concerned (specimen copy of the resolution is attached in annexure "F" hereto) can cast vote, provided, however, that :

(i) the required certified copy of the resolution and/or letter of authority in regard to the category of members under clause Nos. (b) and (c) above, in favor of the person authorised to cast vote, shall be filed in the office of the association at least 4 (four) clear days (excluding the due date of receipt of such resolution and/or letters of authority and the date of the general meeting) before the date of the relevant general meeting at which the election is to take place, and if that day happens to be a holiday, on the day preceding it;

(ii) the name of the member on whose behalf the authorisation/resolution is being filed, is on the register of members of the association on the date of filing of such authorisation/resolution and continue to be so, until the date on which the register of members is closed, prior to the general meeting at which the election is to take place;

(iii) a member, who has not paid the membership subscription in terms of article 20 of the articles of association, or any other dues to the association, and continues to be a defaulter, is not eligible to vote, in terms of article 62(ii) of the

articles of association, notwithstanding the fact that the name of such a member appears on the register of members of the association on the date of filing of the required authorisation/resolution and continues to be so until the date of closure of the register of members prior to the election;

(iv) in the case of partnership firm members with only one major partner, no authorisation will be necessary, as such a major partner will be deemed to be in the position of a sole proprietor for the purpose of voting only; provided, however, a declaration has been already made about the age of the second minor partner in the membership application form itself, while membership application form was filed by the partnership firm.

If there is any constitutional defect in the concern of any member, the record of the association so maintained, shall be final for the decision of the chairman and no member shall raise any objection for his own fault for not correcting his/her record in the association."

26. In respect of this rule, there can be no doubt that there is no difficulty about proprietors, i.e., members, who are not partnership firms or companies. In the case of a partnership firm, all that is objected to is the issue of an authority letter by the association. We propose that annexure II of the articles of association should be treated as deleted and order accordingly and the unnecessary words in clause (b) should be deleted. This sub-clause will not read :

"(b) any one of the partners of a partnership firm member duly authorised by all other partners of such partnership firm to cast vote on behalf of the firms in writing."

27. As far as sub-clause (c) is concerned, there is no real objection to the same. It is retained. As far as sub-clause (i) of the proviso is concerned, it will remain as it is with the addition of the following words :

"the resolution or letters of authority filed in accordance with this rule shall continue to operate in all subsequent annual general meetings unless varied by a specific resolution or letter of authority, as the case may be."

28. This changes in accordance with section 187 of the Companies Act, which provides that the resolution entitles the representative to vote. The section does not contemplate a fresh resolution being filed for every meeting. There is also sub-clause (iv) which deals with partnership firms where there is one major partner and a minor partner which we think may be retained as it is. But, as this rule visualises objections before the chairman, it is noted here for this purpose. We think that this amendment in the election rules will facilitate the voting by the company members and partnership members which is one of the main points of objection.

29. Turning now to the appointment of the chairman, we think that Mr. R. K. Kaul, Joint Registrar of this court, who has been appointed chairman of the committee can be nominated by us to be the chairman of the meeting. He will be

given a fee of Rs. 2,500 and he will be assisted by Shri S. M. Saxena, superintendent, who has been associated in the past with the committee in the previous elections and such other members of the court staff as the company judge may nominate. The fees of these persons including Shri S. M. Saxena will be settled by the company judge. The payment will be made by the company.

30. Turning now to the question of objection to the register of members and voters list, as far as the register of members is concerned, the chairman may for the purpose of the meeting treat it as conclusive. Unless rectified by an order of the court, the register of members is effective, and will be used as such at the annual general meeting for the purposes of voting. However, as a variety of questions and problems may arise at the meetings when the voting takes place, we would like to set out a set of directions to meet some contingencies that may arise. We have kept in view the allegations in the main petition regarding the possibility of the elections being manipulated :-

(1) It is possible that a person is entered in the register of members but is not entitled to be a member. This is a case of possible bogus voters. In such a case, the chairman may note the objection, but will allow the person to vote if the name is in the register of members and the voters list. The court will consider such objection later, if necessary.

(2) It is possible for a person's name to appear on the register of members and yet not be on the voters list. In such a case, the chairman will note the nature of the objection and allow the vote to be cast as an objected vote. However, the objected vote will not be taken into consideration when result is declared, but should be kept separate. In case the objection regarding exclusion is upheld by the court, such vote may have to be included in the recount, if any, is directed.

(3) There are disputes regarding the identity of a voter or of a representative which might arise. In such a case, the objection should be settled on the basis of the record, i.e., the signatures of the voter and those on the record of the company, or any other method which the chairman thinks appropriate to the situation.

(4) If there is a person claiming to be a member whose name is neither on the register of members nor on the voters list, such a person should not be permitted to vote, but it will be open to the chairman to record the person's objection, if he is so advised.

(5) These directions only relate to situation we can visualise and if there are others, the chairman may exercise his discretion.

31. Before parting with this appeal, it is useful to say that section 403 of the Companies Act visualises an interim order of the type can be passed u/s 402, with a view to bring to an end the oppression or mismanagement visualised by section 397 and 398 of the Act. The holding of a future annual general meeting under the provisions of the Companies Act hardly qualifies to be classified as

mismanagement or oppression u/s 397 or 398 of the Act. So, it might be asked, how the court can pass orders altering the election rules or other procedure relating to the annual general meeting ? In this case, it so happens that the type of oppression or mismanagement alleged in the petition is connected with the elections because the case of the petitioners is that fair and impartial elections are not held and the same people come back to power as members of the executive board from time to time. This may be the result of two possibilities. Either the elected persons are supported by the majority of the members, or there is something wrong in the election procedure. With a view to minimising the possibility of the elections being held in a manipulated manner or in some manner which prevents a fair and impartial result, we have been compelled to give the aforementioned directions. We hope that as a result of the changes, a fair and impartial election can be held.

32. In the result, we accept this appeal partly and direct the annual general meeting to be held within the shortest possible time. The annual general meeting in question relates to the period ending March 31, 1982, and consequently the accounts and reports for that period alone have to be placed before the meeting. The company court may as soon as these elections have been held give any directions that may be necessary for holding the annual general meeting for the subsequent periods, i.e., March 31, 1983, and March 31, 1984, as those periods have also expired in the meanwhile. In view of the nature of the case and the controversy as well as the result of the appeal, we allow the parties to bear their own costs.