
(2003) 05 DEL CK 0088

In the Delhi High Court

Case No : IA No. 1880 of 2003 in Suit No. 383 of 2003

Dr. Dileep Makhija and Others

APPELLANT

Vs

Mr. Arun Mittal and Others

RESPONDENT

Date of Decision : 14-05-2003

Acts Referred:

Citation : (2004) 118 CompCas 694 : (2003) 105 DLT 793 : (2003) 69 DRJ 154 : (2003) 47 SCL 241

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Sudhanshu Batra, for the Appellant; U.K. Chaudhary and Ranjana Roy Gawai, for the Respondent

Judgement

Vikramajit Sen, J.—This order shall dispose of the plaintiffs' application filed along with the plaint under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. The plaintiffs have prayed for the passing of an ad interim injunction restraining the Defendant Nos. 3, 4 and 5 from acting as shareholders or directors of Defendant No. 6; passing of an ad interim injunction restraining the Defendants from acting on an alleged resolution passed in the alleged illegally convened and conducted Meetings of the Board held on 5.11.2002 and 25.1.2003; passing an ad interim injunction restraining the Defendants from interfering with the smooth running of Geetanjali Hospital. The prayers in the plaint are also similar to these prayers.

2. It is not in dispute that Defendant No. 6 was purchased by the plaintiffs and Defendant No. 1 from the erstwhile and original shareholders and promoters of Geetanjali Nursing Home Private Ltd. (Hospital for short). A Memorandum of Understanding dated 29.9.1992 was entered into between the plaintiffs and Defendant No. 1 along with the promoters Dr. Chander Vir and Dr. Sheila Vir. Subsequently, Dr. Chander Vir and Dr. Sheila Vir transferred their shares in favor of Defendant Nos. 1 and 2 and a fresh agreement dated 3.8.1995 was entered into between the plaintiffs and Defendant No. 1. The interpretation of the terms

of this Agreement will be the fulcrum of the decision on the application. It is the plaintiff's case that the Hospital has been running in accordance with the terms of the Agreement dated 3.8.1995 and the plaintiffs have been appropriating the profession fee collected by them. The plaintiffs asserted that they have a right to remain permanent Directors of the Hospital and to retain the working chambers in the Hospital and also to restrict new doctors from rendering consultancy from the Hospital. It is also the plaintiffs' case that while the Hospital was to be managed wholly and solely by Defendant No. 1 to the extent of making statutory compliances, maintaining account of revenue received, the day-to-day working of the Hospital was to have been conducted by the plaintiffs. It is conceded by the plaintiffs that they hold amongst themselves approximately 20% of the shareholding in the Hospital, the remainder being held almost entirely by Defendant Nos. 1 and 2. It has also been conceded that the plaintiff Nos. 1 and 2 have signed Annual Reports, Balance-Sheets as prepared and produced by Defendant No. 1, but this was done by them in good faith without reading the contents thereof. It has also been averred that the plaintiff Nos. 1 and 2 have at some occasions signed blank papers on the understanding that the same would be filled up in accordance with statutory requirements. It is pleaded that the plaintiffs worked with utmost sincerity and dedication, introduced new doctors to the Hospital and thereby increased its turnover from Rs. 1,80,994/- on 31.3.1994 to Rs. 91,05,652/- as on 31.3.1999. The cause of action for the filing of the present suit is stated to be discovered by the plaintiffs in January, 2003 on the allotment of shares by Defendant Nos. 1 and 2 to Defendant Nos. 3, 4 and 5 and their appointment as Directors without the consent and knowledge of the plaintiffs. It is further pleaded that the plaintiffs were permitted only a cursory look on the minutes of the Board Meeting, as recently as on 21.1.2003. It is in these circumstances that Defendant Nos. 1 and 2 issued the notice dated 22.1.2003 for convening an Extraordinary General Meeting (EGM for short) on 25.1.2003 with the intent of increasing the authorised capital so as to dilute the plaintiffs holding to less than 10%, thereby depriving them of their rights u/s 399 of the Companies Act. Immediately thereupon, on 23.1.2003 the plaintiffs served a legal notice on Defendants, thereby requesting for an adjournment of the proposed EGM on 25.1.2003 which was not granted. As a consequence on the plaintiffs attended this Meeting they allegedly discovered the presence of unauthorised persons there, leaving them with no option but to walk-out in protest. A reading of the Defendant's letter dated 1.2.2003 candidly admits that " the new practice of maintaining the attendance sheet and sending the notice by Registered Post is now pressed into practice only because of your false and frivolous allegations and your taking advantage of the informal atmosphere regarding the service of notice by hand and hence the Meeting of the Board of Directors without obtaining any signatures on the attendance sheet, particularly raised at the Meeting of the Board held on 5.11.2002." Predicated on this statement, Mr. Sudhanshu Batra, learned counsel for the plaintiffs, has submitted that all decisions of the Board have been rendered unenforceable and non est due to the violation of the mandatory statutory requirement of serving the notice

of the meetings on the plaintiffs. It is further averred that the plaintiffs on inspecting the records of the Registrar of Companies learnt of the appointment of Defendant Nos. 3, 4 and 5 as Directors of the Hospital and the allotment of its share to them.

3. The gravamen of the defense to the suit centres on the overwhelming majority shareholding of Defendant Nos. 1 and 2, which has already been noted to extend to approximately 80%. Mr. Chaudhary has laboured to highlight that upon attaining 76% shares these Defendants could have passed not only special resolutions, but even those pertaining to the removal of any Director. It is also his submission that in these circumstances there would have been no need whatsoever for these Defendants to fabricate and manipulate the records of the Hospital. It is argued that for this reason the workings of the Board were informal as the plaintiffs did not evince any interest in the Hospital's management, which situation is manifested by the plaintiffs' case that they blindly signed documents. Mr. Chaudhary has laid great store on the terms of the Agreement dated 3.8.1995 and has strenuously challenged the plaintiffs' plea that the plaintiffs cannot be removed from the Board; he has emphasised that any Director can be removed by an ordinary resolution. He has further contended that the prayers in the plaint and this application ought not to be granted since the acquiescence of the plaintiffs in the manner of the Hospital functioning is writ large; that they have not remonstrated for issuance of written and/or formal notice throughout the period 1995-2002; that the plaintiff's have been privy to formal non-adherence of the statutory obligations contained in the Companies Act. Mr. Chaudhary has further submitted that there has been no significant change in the share holding since 1998 and the authorised capital has remained the same. When for the first time the plaintiffs refused to sign the Balance Sheets, the Meeting scheduled for 25.1.2003 was called. Mr. Chaudhary has strenuously argued that the reliefs are liable to be rejected on the short ground of laches. There is no legal requirement that Directors must also be shareholders, and keeping the 80% shareholding of Defendant Nos. 1 and 2 in perspective, any person could have been successfully sponsored by them onto the Board. On this ground also the charge of manipulating and fabricating documents/minutes of the Board Meetings has been repulsed.

4. I shall first consider whether the plaintiffs have succeeded in establishing the existence of a prima facie case in their favor. Their apprehension is that Defendant Nos. 1 and 2 intend firstly to remove them from Directorship of the Hospital and thereafter from practicing in the Hospital altogether. Significantly this relief has not been prayed for.

5. The first document that should be perused and its terms carefully construed is the Agreement dated 3.8.1995, which is between Defendant No. 1 and the three plaintiffs. By virtue of Clause 1 thereof it was agreed that Defendant Nos. 1 and 2 could acquire the entire shareholding of Dr. Chander Vir and Dr. Sheila Vir, thereby increasing these Defendant's shareholding to 66% of the subscribed

share capital. Clause 2 records that Defendant No. 1 would be the Chairman and Managing Director and the plaintiffs "shall continue to be permanent Directors of the Company and shall have permanent working chambers in the hospital." Significantly, it was further agreed that the authorised capital would be raised to Rs.55 lakhs and Defendant Nos.1 and 2 and their associates "shall have 80% of the total shareholding or even more but not less than 76% at any given point of time." Thereafter there are covenants restricting new Doctors from practicing in the Hospital as also the existing Doctors (including the plaintiffs) from practicing anywhere else. Clause 14A has been hand-written upon the Agreement but has admittedly been cancelled and scored out. It reads thus- " That no new directors would be inducted into the Board without unanimous decision of the Board."

6. At this stage of the litigation what must be inferred from the scoring out of the proposed holograph clause is that it was not agreed that persons could be taken on the Board of Directors unless there was unanimity on this proposal. In other words there was consensus that any one could have been appointed as a Director, so long as there was compliance with statutory stipulation, and the relevant Articles of Association. This drastically dilutes the importance of the clause that the plaintiffs would continue on the Board. The plaintiffs' reliance on *Bushell Vs. Faith* (1970) 1 ALL ER 53 : [1970] 40 Com. Cas. 944) and *Harman Vs. BML Group* (1994) 2 BCLC 674 appears to me to be of no avail to them. Both these judgments gave due implementation to understandings which had the effect of creating "entrenched voting rights on particular questions." This proposition ought not to be viewed in isolation of well-settled position enunciated in *Life Insurance Corporation of India Vs. Escorts Ltd.* [1986] 59 Com. Cas. 548 in which the Constitution Bench opined inter alia that- "A shareholder has an undoubted interest in a company, an interest which is represented by his shareholding. Share is movable property, with all the attributes of such property. The rights of a shareholder are: (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief in the case of oppression; (v) to apply to the court for relief in the case of mismanagement; and (vi) to apply to the court for winding up of the company; (viii) to share in the surplus on winding up The only effective way the members of a company in a general meeting can exercise their control over the directorate in a democratic manner is to alter the articles of association so as to restrict the powers of the directorate and appoint other directors in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, directors of their choice and the power to regulate them by a resolution for their removal. An injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another Every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements, to call an extraordinary general meeting in accordance with the provisions of the Companies Act. He cannot be restrained from calling a meeting and he is not bound to disclose the

reasons for the resolutions proposed to be moved at the meeting. Section 173(2) of the Companies Act, 1956, does not require the shareholder requisitioning a meeting to disclose the reasons for the resolutions which he proposes to move at the meeting." To my mind the balance must be found in strictly construing any agreement which has the consequence of severely curtailing the strength of the majority and giving effect to corporate democracy. We are dealing with financial issues here, and Therefore the only safeguards that should be implemented are those statutorily articulated in the sundry provisions of the Companies Act. It would cause injustice if one loses sight of the Sections prescribing the necessary percentage of votes required for the passing of any resolution. These categories are typified in Section 189 which envisages ordinary resolution and special resolution respectively requiring a simple majority of votes cast, and votes in favor being "not less than three times the number of votes, if any, cast against the resolution." The Companies Act, in its pandect Constituting Chapter VI of Part VI comprising Sections 397 to 409 also protects the minority so long as it possesses over ten per cent of the share capital. In the preceding Section 395, the Act permits the forcible acquisition of the shares of any person holding less than ten per cent of the equity of any company subject of course to meticulous adherence of sundry stipulations. On a holistic study of the Companies Act, Therefore, it will be manifestly clear that it assiduously preserves and implements corporate democracy. There is no specific prayer either in the plaint or the application relating to the `entrenched rights" of the plaintiffs, but this aspect has permeated the arguments throughout. It is Therefore necessary to hold that prima facie, the plaintiffs have no rights beyond their continuing on the Board of Directors of the Hospital, as heretofore. It is, also not necessary to reflect on Mr.Chaudhary's contention that on a conjoint reading of Sections 254, 255 and 284 every Board member is to retire by rotation and/or is subject to removal by the shareholders by ordinary resolution. This question is beyond the purview of the plaint.

7. Extensive arguments were made on the non adherence of the statutorily mandatory provisions pertaining to the issuance of notices for every Board Meeting, which are to be found in a fasciculus subtitled `Meeting of the Board" comprising Sections 285 to 290. These provisions prescribe the holding of meeting of the Board at least once in every three months and at least four meetings each year. Written notice of these meetings are to be given to each Directors, but a violation invites a fine extending up to one hundred rupees on the concerned officer of the Company. The plaintiffs assert that there is clear admission that written notices were not served in the past since the Defendants defense depicts the existence of informality between the Directors up to the date on which the plaintiffs refused to sign the Balance Meetings lacked quorum. Reliance is placed on Parmeshwari Prasad Gupta Vs. Union of India, [1974] .44 Com. Cas. 1, Col. Kuldip Singh Dhillon & Others Vs. Paragaon Utility Financiers P. Ltd. and Others., [1988] 64 Comp. Cas.19.

8. In the former case the Hon"ble Supreme Court held that since notice had not

been given to one of the Directors who was also not present, the resolution passed on that date would be invalid. Dhillon's case (*supra*) also sets down the same ratio. What ought not to be glossed over is the fact that the Court considered it relevant that the Director who had not received the notice did not attend the meeting. Therefore, the infraction of the Section can be regularised and legalised by the presence of the Director and secondly that the repercussions of the infraction is only the imposition of a fine. At the present stage of the litigation it would be wholly inappropriate for the Court to go into the allegation of failure to issue written notices of the meetings which have attained some antiquity. The plaintiffs have not objected to the meetings held earlier and it is possible to assume that the resolutions of the Board had their implicit, if not explicit, consent and approval. When issues pertaining to the past are raked up after the lapse of considerable time, I find it difficult to hold that a *prima facie* case has been disclosed and/or that the balance of convenience lies in favor of the plaintiffs. This position would be altogether altered if the challenge is to the last meeting, of which none of the plaintiffs had received notice and or to a future meeting. Of course the plaintiffs may succeed in establishing the case at the final stage of the case, after due opportunity is made available to both the adversaries to prove the violation of statutory provisions or to the Articles of Association which are allegedly inviolable. It is well settled that a slothful party, who has not come to Court at the earliest available opportunity, would ordinarily not be entitled to discretionary relief. In Parmeshwari Prasad (*supra*) the Apex Court held the relevant Resolution to have been ratified at the subsequent Board meeting. In *Maharaja Exports & Another Vs. Apparels Exports Promotion Council*, [1988] 64 Comp. Cas. 353, the Single Judge of this Court has declined interim relief on the grounds that the plaintiff was aware of the holding of the meeting but had waited till eleventh hour. It should also not be overlooked that the plaintiffs have themselves pleaded that they had signed various papers blindly. This can only disclose their approval of the manner in which the Meetings of the Board were conducted in the past and also their assent of the decisions taken there at. At this stage this consent can be seen to have continued through out the period 1995 to 2002.

9. I am fortified in this view in the following passage from the treatise on the Companies Act by A.Ramaiya, Fifteenth Edition 2001 on page 2499 - "Where notice is not given as required but all directors attend the meeting and do not object to the absence of notice, or where the absentee directors do not complain of want of notice, the proceedings at the meeting will not be invalid, especially, if they are ratified at a subsequent meeting at which the absentee directors are present. It was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the company. Ratification generally relates back to the date of the act ratified. Cf. *Bharat Fire and General Insurance Co. Ltd. v. Parameshwari Prasad Gupta* AIR 1968 Delhi 68 see also, on appeal, to the Supreme Court, *Shri Parmeshwari Prasad Gupta Vs. The Union of India (UOI)*, Portuguese Consolidated Copper Mines

Co Re, (1890) 45 Ch D 16 ; In Re: Peninsular Life Assurance Company Ltd., ."

10. An objection has also been taken by Mr. Chaudhary that this Court ought not to exercise jurisdiction and that the plaintiff would have been better advised to approach the Company Law Board for redressal of their grievances. The answer in favor of the plaintiff is to be found in the decision of his Lordship M.Jagannatha Rao in *Avanthi Explosives P. Ltd. Vs. Principal Subordinate Judge, Tirupathi, And Another*, [1987] 62 Comp. Cas. 301. His Lordship, while adorning the Bench of Andhra Pradesh High Court, had opined that the rule against interference by Court with the internal management of the Companies is not applicable to cases of infringement of individual membership rights as distinguished from corporate membership rights. It was further held that the general law of contract is the basis of the rights of parties and the Companies Act, 1956, merely regulates these rights and does not create any new rights or remedies. Unless there is an exclusion of the jurisdiction of the civil court, by words express or implied, a suit in respect of individual rights would not be excluded. In *Maharaja Exports* (supra) it was similarly held that the jurisdiction of the civil court is not excluded.

11. It has been contended on behalf of the plaintiffs that the requisite quorum was not available in most of the previous meetings of the Board, as prescribed in Section 287 of the Companies Act. It has been argued that the minutes are fabricated and wrongly mention the plaintiff No. 2 to be present at the meeting, and that these minutes have not signed by plaintiff No. 2. In this regard it is appropriate to refer to Sections 193 to 196 of the Companies Act. These lay down the formalities which must attend the recording of minutes and incorporates a presumption that where minutes have been kept in accordance with the provisions of Section 193, then, until, the contrary is proved, the meeting shall be deemed to have been duly called and held and all proceedings thereat to have duly taken place and in particular all appointments of director made at the meeting shall be deemed to be valid. The plaintiffs possess statutory rights to inspect the Minutes Books. At this stage of the litigation to my mind it is not possible for the Court but to accept the genuineness of the minutes produced as no grounds have been disclosed which indicate conclusively to the contrary. It may subsequently be proved that these minutes were fabricated and/or that they incorrectly recorded the proceedings. Unless there is a palpable and manifest impropriety or inconsistency which appears on the face of the minutes, it would make the functioning of a company almost unworkable if the presumption as to correctness of the minutes is not given at the prima facie stage.

12. It has next been contended on behalf of the plaintiff that the object of the calling of the EGM is to remove the plaintiffs from the Board of Directors. As has been mentioned there is no prayer for interdicting the removal of the plaintiffs from the Board. The views of the Hon"ble Supreme Court in the LIC case (supra) are indeed apposite and these have also been applied in *S. Varadarajan Vs. Venkateswara Solvent Extraction (P.) Ltd. and Others*. [1994] 80 Comp. Cas. 693. As it would be highly improper for the Court to grant an injunction

restraining the holding of a meeting even though the underlying intent may be so. In this context it would be relevant to mention the decision of this Court in Tarlok Chand Khanna and another Vs. Raj Kumar Kapoor and others, [1983] Vol.54 Com. Cas. 12 where the powers of the shareholders to control the directors by their removal u/s 284 was highlighted.

13. It would also be of advantage to mention that in Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others, the Apex Court did not find any legal impropriety in declining a prayer made after considerable delay.

14. The only argument which remains to be considered is whether certain members have been wrongly inducted on to the Board of Directors. It has been strongly emphasised that the Minutes pertaining to the Board Meeting held on 15.7.1998 state that " Chairman places before the Board papers received from Mrs. Raj Devi requesting the transfer of one share hold by her to one Ms. Meghna Mittal." It is not in dispute that Smt.Raj Devi died on 17.2.1993. I do not propose to go into the question of whether proper notice of the Meeting held on 14.7.1998 was given or not, for the reasons already outlined above. The transfer is of one share only to Ms. Meghna Mittal, Defendant No. 3, which seen in the backdrop of the Defendant Nos.1 and 2 holding 80% shares, pales into insignificance. Counsel for the plaintiffs has not shown that only a shareholder could have been appointed as a Director. I am mindful of that the presence of the Directors other than Defendant Nos.1 and 2 would be critical to the latter's interests since they would not be in a position to pass any Resolutions without the consent of the plaintiffs. There is also a possibility that the Minutes have been prepared as a defense to the suit, and in this event would become contemporaneously relevant. However, the Defendants have relied on Form 32 filed with the Registrar of Companies on 16.7.1998, which removes the possibility of `working-up" minutes, and indicates that, rightly or wrongly, Defendant No. 3 had been inducted onto the Board as far back as in July, 1998. A prima facie case does not exist in favor of the plaintiffs on this point . These reasons apply mutates mutants to Shri Suhail Mittal (Defendant No. 4) also, as Form 32 pertaining to his appointment as a Director is stated to have been filed in the office of the Registrar of Companies on 28.6.2002. So far as Mrs. Rashmi Aggarwal (Defendant No. 5) is concerned, the Return of Allotment in Form No. 2 has been filed with the Registrar of Companies on 29.9.1995 and this document also shows that shares were allotted to Dr.Gopal and Dr.Khemani at that same time. The names of Defendant No. 3 and Defendant No. 5 have been shown as the Directors of Defendant No. 6 for the period ending on 31.3.1999. Sundry documents have been signed by plaintiff Nos.1 and 2 also. It is not possible to accede to the submission that all the Minutes have been fabricated.

15. Notice of the Meeting scheduled for 25.1.2003 has been sent by Defendant No. 1 by registered post for the first time on 22.1.2003, pursuant to the decision of the Board Meeting held on 5.11.2002 (In the Written Arguments the Defendants have themselves stated that the plaintiffs have not attended any

Board Meeting after 1995, but attended the Meeting convened for 25.1.2003). The plaintiffs have specifically pleaded that they did not receive any notice for the Meeting allegedly held on 5.11.2002 and have submitted that no such Meeting was held. It is the Defendants case that this Meeting was convened in the wake of the lodging of an FIR for alleged misappropriation of funds, which were deposited and refunded by plaintiff No. 2. The events had transpired consequent upon a complaint dated 31.10.2002. It is wholly incredible that even in these extraordinary circumstances Defendant No. 1 did not consider it necessary or appropriate to send the notices of the Meeting by registered post. None of the plaintiffs had attended this Meeting, nor have they been served with its Minutes. The plaintiffs could be attributed with knowledge of that Meeting for the first time on their receiving the notice dated 22.1.2003. An adverse influence cannot fairly be drawn against them on the count of it being imperative that an annual or quarterly meeting of the Board should be held. So far as a challenge to this Meeting is concerned, delay is also not a factor which could be held against them. On the strength of the precedents already discussed hereinbefore, I have no hesitation in holding that the Meeting allegedly convened and held on 5.11.2002 shall be deemed not to have taken place and all decisions purportedly passed thereat shall be treated as null and void. I have perused the Minutes of the Board Meeting dated 25.1.2003 and in this respect the passing of the Minutes pertaining to the alleged Meeting of 5.11.2002 shall be deemed to have been struck down.

16. The application is disposed of in these terms. The Defendants shall issue fresh notices of the EGM and or any Board Meeting in strict compliance of statutory provisions and of the Articles of Association.