
(1984) 08 CAL CK 0015
In the Calcutta High Court
Case No : Suit No. 639 of 1983

Gopal Das Gujarati

APPELLANT

Vs

Titagarh Paper Mills Co. Ltd. and Others

RESPONDENT

Date of Decision : 13-08-1984

Acts Referred:

Companies Act, 1956 — Section 173(2)

Citation : (1986) 60 CompCas 920

Hon'ble Judges : Asha Mukul Pal, J

Bench : Single Bench

Advocate : Prabir Sen, for the Appellant; R. Nag, for the Respondent

Judgement

Asha Mukul Pal, J.—This is an application by one Gopal Das Gujarati for an order of injunction restraining the defendants, namely, the Titagarh Paper Mills Co Ltd., Kanak Ghosh, working for gain at 95, Park Street, Calcutta, and others including Sri Betrabet, Deputy General Manager, Development and Planning, and N. I. Gangaram, Deputy General Manager, working for gain at the Industrial Development Bank of India along with others from proceeding with or acting in terms of the notice dated August 24, 1983, calling the annual general meeting on September 30, 1983, and also from holding the annual general meeting on the said date. Appointment of administrator and/or special officer has also been sought for over the Titagarh Paper Mills Co. Ltd., defendant No. 1.

2. The petitioner's case is that at all material times, he was and still is a shareholder of the Titagarh Paper Mills and he is holding 32,179 fully paid-up ordinary shares of Rs. 10 each in the capital of the Titagarh Paper Mills. Respondents Nos. 2 to 9 are acting and/or holding themselves out as directors of the Titagarh Paper Mills. His further case is that A, B. Majumdar and Kanak Ghosh are purporting to act as wholetime directors of the company without the appropriate sanction of the Central Government. Industrial Development Bank of India, Industrial Credit and Investment Corporation Of India Ltd., Industrial Financial Corporation of India and Life Insurance Corporation of India have

advanced substantial loans to Titagarh Paper Mills and due to mismanagement by the directors, the loans of the financial institutions could not be paid in accordance with the schedule and as a result whereof the delinquent management converted a part of the loan into equity share capital in the said Titagarh Paper Mills. The other defendants, the petitioner alleges, are the nominees of the different financial institutions named before but most of them, it is stated, are engaged in their own business or not mindful of the business of the defendant company and the actual day-to-day business of the affairs of the Titagarh Paper Mills was and/or still is vested in Sri Mazumdar and Sri Ghosh who at all material times were and/or are still "pretending" to act as wholetime directors of the Titagarh Paper Mills Ltd. For the last two years, the company had failed to declare any dividend and it was, as alleged by the petitioner, due to the mismanagement and inefficiency of the management leadership.

3. In paragraph 10, it has been alleged that on or about September 8, 1983, the petitioner received a notice dated August 24, 1983, purporting to call an annual general meeting on September 30, 1983. This is the notice which has been challenged in the suit and this is the notice which the petitioner wants that the court should direct that the defendant should be restrained from giving any effect thereto. The petitioner's case as stated in paragraph 11 of the petition is that as the said notice contained agenda of far-reaching consequences, he wrote a letter on September 8, 1983, to the Titagarh Paper Mills raising certain "pertinent queries" (according to the petitioner) and also relating to management and administration of the Titagarh Paper Mills Co, Ltd., in order to enable the petitioner to apply his mind to exercise his voting rights accordingly. But no reply was received by the petitioner from any one of the directors of the company.

4. In paragraph 12 of the said petition, the petitioner formulates the grounds why the said notice and the annual general meeting which was held on September 30, 1983, pursuant to the said notice should be held to be illegal and ultra vires the Companies Act.

5. His first ground is that defendant No. 3 has offered himself for reappointment as director and the directors' report, states that as Sri T. N. Gidwani does not wish to seek re-election, the board did not propose to fill up the vacancy caused by the retirement of Mr. Gidwani and Mr. Kanak Ghosh (defendant No. 3) being eligible offered himself for reappointment. The petitioner's contention is that the appointment of Sri Kanak Ghosh as a special director cannot be said to be an ordinary business but a special business within the meaning of Section 173 of the Companies Act, inasmuch as the agenda of appointment of Sri Kanak Ghosh as full time director was a special business and, as such, u/s 173(2), it should have been clearly mentioned in a statement annexed to the notice of the meeting. His main grievance is also that it will appear from the director's report that for the year 1982-83, the approval of the Central Government sanctioning the terms of appointment of Kanak Ghosh as wholetime director has not been obtained from the Central Government as required under the mandatory provisions of law and

in order to bypass the said mandatory provision, it was sought to be done under the garb of ordinary business. In the language of the petitioner (paragraph II(IV)):

"The wholetime directorship of defendant No. 3, Sri Kanak Ghosh, is sought to be smuggled in the agenda without giving the shareholders the minimum information that is required to be given under the provisions of the Companies Act. In fact, in the said notice, not only the factum of such non-approval has been suppressed but the deliberate misleading and tricky agenda has been inserted in an innocuous manner to mislead and hoodwink the shareholders including the petitioner."

6. The petitioner's case is that the explanatory statement does not at all explain the material facts in any explanatory way.

7. Mr. Prabir Sen, counsel for the petitioner, contends that none, sitting in the arm-chair of the absentee shareholders, could be enlightened as to the real state for which the items of agenda were sought to be resolved and he criticised most of the agenda of raising of loans in challenging the said explanatory statement. The petitioner's grievance is that "in the absence of any answer to the legitimate queries made by the petitioner, it is well nigh impossible for the petitioner to apply his mind and cast his voting rights either in favour of or against the passing of the resolution relating to the profit and loss account.

8. His further grievance is that agenda No. 4 relates to authorising the board to have the power to borrow money to the tune of rupees forty crores; the explanatory statement relating to the said item is misleading and does not disclose material facts. The petitioner challenges that the ground on the basis of which the borrowing power was sought by the board was a sort of conferring a blanket power to borrow a huge sum of forty crores without disclosing any particulars. The mere statement that it was required for the reconstruction and/or rehabilitation scheme cannot in any way be said to be explanatory.

9. These are the main grounds on which the petition is based for not giving effect to the notice dated August 24, 1983, and for an order to restrain the directors from holding the annual general meeting pursuant to the said notice and on the basis of which an argument was advanced before me by the petitioner's counsel. The grounds are really two: one is that without the sanction of the Central Government, Kanak Ghosh cannot be appointed as a full time director and/or he cannot draw remuneration as a full-time director which he did in violation of the provisions of Section 309 read with Section 269 of the Companies Act and the second ground is that why such a huge sum was required to be borrowed had not been fully explained in the explanatory statement.

10. In paragraph 16, the petitioner states that unless the defendants are restrained by a temporary order of injunction from holding the annual general meeting on September 30, 1983, and passing illegal resolutions therein and unless the said Sri Kanak Ghosh is restrained from reappointing himself as whole

time director by virtually committing a fraud upon the shareholders, the plaintiff will suffer irreparable injury and for the ends of justice and to avoid such irreparable injury, an order of injunction prayed for should be granted as it would be just and equitable in the facts and circumstances of the case. I should state here that the petition was affirmed on September 30, 1983. That means the date of the meeting and the application for ad interim injunction was sought for after the meeting was over. It may also be noted that the petitioner did not appear in the said meeting. I say all these things which I shall deal with later on for my finding whether the application is a bona fide one and whether any relief can be granted in the facts and circumstances of the case as made out in the petition.

11. Mr. Prabir Sen, counsel for the petitioner, in order to show that Kanak Ghosh could not be appointed as a wholetime director because of the absence of the Central Government approval cited a judgment in Titagarh Paper Mills Co. Ltd. and Others Vs. Union of India (UOI) and Others, where Titagarh Paper Mills under an application under Article 226 of the Constitution challenged the withholding of the approval regarding reappointment of three wholetime directors including Kanak Ghosh and lost the application. But, however, I have been shown by counsel for the respondent, Titagarh Paper Mills, that before the said judgment was published, the approval of the Central Government was accorded to the appointment of Kanak Ghosh as wholetime director. Therefore, so far as that part of the argument is concerned, it loses its force and as a matter of fact, counsel for the petitioner virtually concedes that point, only submitting (when the letter of approval was shown) that his client would enquire into the matter and take necessary steps for setting aside of the said approval moving in the proper forum. Therefore, the other point that is left before me is whether the requirement of borrowing had been properly or duly explained in the explanatory statement and whether the absence of the full explanatory statement vitiated the notice and the meeting held thereunder, along with the resolution passed in the said meeting.

12. Mr. Sen cited before me a judgment in Firestone Tyre and Rubber Co. Vs. Synthetics and Chemicals Ltd. and Others, . At page 435 of the said report, justice Madon, as his Lordship then was, observed that it is the duty of the company acting through its board to incorporate in an explanatory statement all material facts concerning the item of special business to be transacted at a meeting. The passage to which my attention has been drawn at page 435 of the said report is as follows :

"Any fact which would influence them in making up their minds, one way or the other, would be a material fact u/s 173(2) and had to be set out in the explanatory statement to the notice of the meeting. The views expressed by the Company Law Board would have certainly played a part, and perhaps an important part, in enabling the company's shareholders to make up their minds whether to vote for approval of the further appointment or not."

13. In another judgment, Shalagram Jhajharia Vs. National Co. Ltd. and Others,

a Division Bench of the Calcutta High Court held that u/s 173(2), the explanatory note with regard to the special item of business is to be annexed to the notice of the meeting; and if it was not done, there was no compliance with the requirements of Section 173(2) of the Companies Act inasmuch as it was incumbent under the said section, that if any special business was to be transacted at the meeting, it should specify the nature of such business in the notice.

14. Mr. Nag, appearing for the respondents, drew my attention to item No. 4 of the explanatory statement and I find that the figure of rupees forty crores sought to be borrowed as stated in the petition does not indicate the correct state of facts regarding this amount to be borrowed. The company has specifically stated:

"Item No. 4: Section 293(1)(d) of the Companies Act, 1956, provides, inter alia, that except with the consent of the company in a general meeting, the board of directors shall not borrow moneys, if the moneys to be borrowed, together with the moneys already borrowed by the company (apart from temporary loans, obtained from the company's bankers in the ordinary course of business) exceed the paid-up capital of the company and its free reserves, that is to say, reserves not set apart for specific purposes. The proposed resolution is intended to satisfy the said requirements of the law. By a resolution passed by the company at its annual general meeting held on September 29, 1978, the board of directors of the company was authorised to borrow in excess of its paid-up share capital and free reserves up to a limit of Rs. 15 crores. In connection with its expansion/modernisation scheme, the company has already obtained loans from various financial institutions and State Bank of India. The company will require further loans for its reconstruction/rehabilitation scheme relating to its mills at Titaghar and Kankinara in West Bengal, Choudwar in Orissa, and also for the purpose of its business."

15. It has been denied in the affidavit-in-opposition that the notice is misleading and tricky. It is denied that the explanatory statement does not contain the material particulars. Reference may be had to the statements contained in paragraph 13(c) of the said affidavit-in-opposition affirmed by Kanak Ghosh where such denial has been made. He has also referred to the auditor's report to show the bona fides and to refute the charge of trickiness or mismanagement by the board of the company. It has been argued on behalf of the respondents that he holds only 0.006% of the shares. It does not amount to 1% even. It is further stated that Government holds 61% of the said shares. It has been argued by Mr. Nag and quite rightly that the letter which has been written challenging the notice of the explanatory statement by the petitioner is a document which does not purport to touch the real point. It relates to some matters of the years bygone, a matter of the past. By reading the said letter, it appears that the petitioner does not have any tangible material to say against the management for the purpose of his real interest in the company. It appears to me that if I allow that letter to be taken into account seriously from a person who holds

0.006% shares, I shall be allowing a minimal minority to hold the overwhelming majority to ransom. Such an order would be against any legal norm: equitable principles too deter me from making any such order.

16. The very conduct of the petitioner does not prima facie show that he was really interested in the real interest of the company in praying for an order of injunction. His conduct, also does not show his real concern. He had enough time to come forward for asking for an interim order. He came before the court on the last date and that also after the meeting was over. I have been cited a judgment, *Surajmull Nagarmull v. Shew Bhagwan Jalan* ILR [1973] Cal 207. A. N. Sen J., as his Lordship then was, in such a case refused to grant an order of injunction. The ratio of the said judgment has been accepted by D. K. Sen J. I have dealt with the same in the concluding portion hereinafter. In *Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others*, , Justice P. B. Mukharji, presiding over a Division Bench, following the Privy Council judgment in AIR 1928 180 (Privy Council) , observed that a shareholder who by his conduct shows that he knew the real effect of the work to be transacted at a meeting, cannot complain of a notice on the ground of insufficiency. Here also he knew about all these facts but he did not choose to attend the meeting, but instead, after the meeting was over, moved the court. By such conduct, relief as sought for cannot be granted. P. B. Mukharji J., in the said Division Bench judgment, observed (at pp. 213 and 214 of 32 Comp Cas) :

"besides, we are not satisfied on the facts here, that there has been any failure to comply with the substance of Section 173(2) of the Companies Act. How much is "all material facts" and what is "nature and extent of interest" u/s 173(2) are questions of fact and degree to be judged in each case."

17. In another Division Bench judgment, *East India Commercial Co. Private Ltd. Vs. Raymon Engineering Works Ltd.*, , the Division Bench held that solution of problems as to whether all material facts were disclosed depends upon the facts of each case. The Division Bench held that it is not the function of an explanatory statement to travel beyond the proposed resolution. Material facts have to be given but not detailed particulars. The other case which has been cited is also a Division Bench judgment of our court referred to by Mr. Sen in *National Co. Ltd. v. Shalagram Jhajharia* [1979] Tax LR 1629. None of these cases enjoins that the explanatory statement should be a detailed statement and this being a question of fact must be judged according to the facts and circumstances of each case. Here, in the present case, the explanatory statement may not contain the full details, but it is not a tricky one or misleading one as contended by Mr. Sen. It could have been more explicit, but not being so, it does not stand condemned.

18. On behalf of the respondents, a judgment reported in *Sitaram Jaipuria and Others Vs. Banwarilal Jaipuria*, , has been cited. In the said judgment, it has been held by the Division Bench (at page 165 of CWN ; at pp. 108-109 of AIR) as Chief Justice, P. B. Mukharji, observed, in such cases there are two main considerations in an application for injunction. One is the question of balance of

convenience, the other is whether a prima facie case has been made out. In the course of the judgment, Chief Justice Mukharji observed that the petitioner holds seven voting rights (here in this case the petitioner's shareholding is negligible) and in refusing an injunction, the Division Bench took into consideration that an injunction, if issued on the application of such a person who has got only an infinitesimal interest in the shareholding of the company, a stalemate would be created and the entire affairs of the company would come to a standstill.

19. In this case too, there was no injunction and the next annual general meeting is going to be held again in the course of a month or two and if I pass an order of injunction, the entire matter will come to a standstill. Therefore, on the balance of convenience too, it does not appear to me that the facts of this case prima facie justify an order for injunction. Mr. Nag has successfully met all the challenges including item No. 6 of the notice (page 23 of the petition).

20. The criticism of Mr. Sen that Section 81(3) of the Companies Act had not been complied with has been refuted by Mr. Nag by arguing that it was done in conformity with the rules made by the Government in this regard by Notification No. S.O. 2577, dated July 30, 1977, as amended by Notification No. S.O. 1328, dated May 8, 1978, as it would appear from page 24 of the petition. As I said before, the excess payment to Sri Kanak Ghosh which was sought to be argued by Mr. Sen fails as the Central Government approval issued by the Ministry of Law, Justice and Company Affairs dated December 31, 1983, is produced before the court wherein Sri Kanak Ghosh's wholetime directorship has been approved from January 1, 1980.

21. I may also refer here to an unreported judgment of Justice D. K. Sen in Suit No. 1073 of 1980 (Dipak Mazumdar v. Calcutta Chemicals Co. Ltd.). Justice Sen referring to, and following the judgment of Sitaram Jaipuria and Others Vs. Banwarilal Jaipuria, , quoted the observation of the said Division Bench which observed as follows:

" The important point of this decision is that in construing provisions like Section 173(2), too rigid an interpretation should not be made as to hamper the conduct of the business. Section 173(2) of the Companies Act means a notice and the explanatory statement should give the essence and substance of the transaction intended to be passed at the meeting. It is a business document and it must be used in a common sense business-like manner where so long as that standard is satisfied, this court should not be astute to find legal and technical points to defeat the notice and the explanatory statement."

22. Justice Sen also referred to Surajmull Nagarmull v. Shew Bhagwan Jallan ILR [1973] Cal 207, where Justice A. N. Sen, as his Lordship then was, observed that any breach of the provisions of Section 173 does not necessarily have the effect of invalidating a meeting and nullifying the proceedings thereof. I also think here, in the instant case, apart from the balance of convenience, particulars that have been given in the explanatory statement do not invalidate the proceedings in the

facts and circumstances of the case.

23. Considering all the aspects of the matter and after hearing the argument of respective counsel for the parties, I am not in favour of making any order of injunction as prayed for on this application on the grounds mentioned above. In order to avoid repetition, I can only summarise the main grounds which are as follows:

(1) Balance of convenience is not in favour of the petitioner as he is holding only a minimal amount of shares.

(2) The grounds mentioned in the petition lack credibility.

(3) Explanatory statement does not lack the particulars in my view as prima facie it appears to me (it must be noted I am not hearing the suit), lack of particulars on which so much has been said is not such as to justify me to stay the result which had already been passed in a meeting held and approved by an overwhelming majority of shareholders.

(4) It has not been explained why he came on the last date even at a time when the meeting was over although he had the chance to come before.

(5) The next annual general meeting is going to be held shortly.

(6) The conduct of the petitioner is not such as to justify me to grant an order of injunction which after all is an equitable relief. However, I say this without prejudice to the rights and contentions of the parties in the suit. These are the grounds in brief along with other grounds which I stated hereof and which appeared to me as impediments in granting any order of injunction.

24. In view of the aforesaid, I am constrained to say that this application has little merit in view of what has been stated before. I pass no order in this application. It is made clear, however, that this is without prejudice to the rights and contentions of the parties in the suit or in any other proceedings that the petitioner may be advised to take.

25. Costs of the application would be costs in the cause.