

(1957) 05 CAL CK 0029
In the Calcutta High Court
Case No : Original Side Appln.

In Re: Bhutoria Brothers (Private) Ltd.

Date of Decision : 21-05-1957

Acts Referred:

Companies (Amendment) Act, 1947 — Section 77, 78
Companies Act, 1948 — Section 5
Companies Act, 1956 — Section 13, 16, 17, 17(1), 17(2)

Citation : AIR 1957 Cal 593 : (1958) 28 CompCas 122 : 61 CWN 897 : (1958) 2 ILR (Cal) 362

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : R. Choudhury and S.C. Sen, for the Appellant; Ajay K. Basu, for the Respondent

Judgement

P.B. Mukharji, J.—This is an application by Bhutoria Bros. (Private) Ltd., for alterations in the objects of the company as proposed by the Special Resolution of the Extra-Ordinary General Meeting of the Company field on the 25th day of March, 1957 and passed unanimously. The application is dated the 2nd April, 1957 and is made u/s 17 of the Companies Act, 1956.

2. The main object of the Company was to purchase store, sell, manufacture and otherwise deal in the agricultural, mineral and animal products and live-stock, and in the bye-products and the waste-products of their manufacture including jute. Extensive alterations were proposed in the objects by the Special Resolution which tried to include the business in optical, photographic, chemical and surgical goods on the one hand and watches, clocks and musical instruments on the other, as also other kinds of machinery. Due notice of the application was given to the Registrar of Joint Stock Companies. It was, however, discovered later that there was a very large sum claimed by the Income Tax Authorities for more than Rs. 7 lakhs and notice thereafter was, therefore, given to the Revenue Authorities.

3. The Registrar of Joint Stock Companies has opposed this application. In fact, much of the proposed alterations of the objects has now been abandoned by the

applicant which has been duly minuted. This means that most of the objections of the Registrar of Joint Stock Companies have been accepted by the applicant. The three main changes that now are pressed for alteration are found in Clauses 21, 22 and 23 in Ex. A to the petition which the company now wants to be added to the existing objects of the company. These three clauses in substance seek permission to (1) work in jute, cotton and woollen mills and (2) to carry on at the said mills the business of spinners, weavers, balers and pressers of Jute etc., and (3) particularly to start erect, purchase and continue cold storage and ice plants to carry on the business thereof and to manufacture refrigeration machinery and to sell and install the same for others. In fact, it is said that the main part of the business of the company has been for a number of years dealing in cold storage and ice plant. The company does not appear to be very affluent but its main revenue and income are derived from this cold storage and ice plant. Although no objects in the memorandum permitted this business, apparently this company has gone on carrying on that business until now when it feels that there should be a formal permission stated in the proposed objects clause of the memorandum.

4. The burden of the argument of Company's Counsel was unlimited freedom in altering company's objects in the Memorandum. The question was argued largely as a question of law. I shall deal with the law on this point which is frequently misapplied and misunderstood. Section 17 of the Companies Act makes, inter alia, the following provisions in respect of alteration of objects:--

"1. A company may, by special resolution, alter the provisions of its memorandum x x x x x with respect to the objects of the company so far as may be required to enable it -

- (a) to carry on its business more economically or more efficiently,
- (b) to attain its main purpose by new or improved means,
- (c) to enlarge or change the local area of its operations;
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company,
- (e) to restrict or to abandon any of "the objects specified in the memorandum;
- (f) to sell or dispose of the whole or any part of the undertaking or undertakings of the company or
- (g) to amalgamate with any other company or body of persons.

2. The alteration shall not take effect until and except in so far as it is continued by the Court on petition."

5. So far as the alterations of the objects in respect of work in jute, cotton and woollen mills are concerned, they are proposed in Clauses 21 and 22. I think, they can be permitted clearly u/s 17(1)(a) of the Companies Act which allows

object clause to be amended to carry on business more economically and more efficiently and also u/s 17(1)(d) which permits alteration of objects with a view to carry on some business which under existing circumstances may conveniently or advantageously be combined with the existing business of the company. Jute and cotton will certainly come under agricultural products forming one of the main objects in the existing memorandum. I certainly think that so far as these two clauses are concerned, business in, them can be conveniently or advantageously combined with the existing business of the company.

6. With regard to cold storage and ice plants, there was a good deal of controversy. It obviously is a business which does not come under the present clauses of the existing Memorandum. Section 17(1)(d) of the Companies Act permits alteration of the provisions of this Memorandum with respect to the objects of the company to enable it "to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company." Therefore, it is clear from the language of the section that some business which is not already there under the existing Memorandum may be introduced by alteration of the Memorandum provided such business can be conveniently or advantageously combined with the business of the company under existing circumstances. The important conditions to bear in mind in interpreting Section 17(1)(d) of the Companies Act are (1) that "existing circumstances" of the company should be considered and (2) that the nature of the proposed new business must be such that either on the ground of convenience or of advantage the new business can be combined with the existing business of the company. In considering what can either be "conveniently" or "advantageously" combined with the existing business of the company, foremost regard should be given to the views of the shareholders which in this case have been expressed by their unanimous resolution. There is still a residuary power and duty of the Court to see that this expression of view by the share-holders is a sensible one and the introduction of the proposed new business is obviously not something which cannot with reason be conveniently or advantageously combined with the existing business. Most of the original proposals contained in the special resolution were in respect of business which could not by any stretch of language or imagination or business principles or commercial possibilities be regarded as businesses which could conveniently or advantageously be combined with the business of the company in the existing circumstances. For instance, business in clucks, musical instruments and in surgical goods would be a very strange new-comer into a business in agricultural, mineral and animal products and live-stock. In fact, in the original provisions contained in the Special resolution it would be seen that the company wanted to carry on every conceivable business under the sun and for that purpose the company might have avoided all that circumlocution and adopted only one clause in the memorandum saying that all kinds of businesses could be carried on by the company. This is exactly the practice that was condemned by Neville, J., in *re: Brown (John) and Co. Ltd.; Re; Trudegar Iron and Coal Co. Ltd.* (1915) 112

LT 232 (A). There the new clauses as proposed were numerous and lengthy and included almost every kind of business, and some of the clauses only amplified the existing objects. An interpretation clause was introduced among the clauses by reason of which the object stated in any clause could be treated as an independent business, unless otherwise so stated in the clause. It was held that the alterations in that case could be sanctioned only when the clauses were reduced in number and simplified, and the interpretation clause had been deleted and that a further clause was inserted disabling the directors from treating any of the new objects as principal objects without the consent of a special resolution of the company. Neville, J., at p. 234 of the report observed:

"I have been thinking this matter over a great deal. The Legislator may pass a law which will prevent companies trading except within the limits of their memorandum; but, if you have got a memorandum which is co-extensive with the business of the whole world, you get behind the ambit of the legislation.

I think this would meet the case where it is desired (I think unwisely) to have these enormously extended memorandums..... The point is that the directors could abandon the main business and take up an entirely new business without consulting the share-holders. I should stand in the way of the company taking up distinct businesses. Where distinct businesses are proposed by the alterations suggested I would not sanction them except upon evidence that there was a really present desire on the part of the company to extend its business in the directions indicated."

The learned Judge's subsequent observations on the same page of the Report are equally cogent and relevant on the point under consideration:--

"That is one of the anomalies of the Company Law.

What I really feel is that if the Court takes up the line of least resistance, some day the Court may wake up and find that share-holders have lost their money through directors embarking on speculative business.

I am rather inclined to think that it would be better if the applications were limited (even as to ancillary powers) to those the directors desire to carry out, not immediately, but in the near future, rather than to put in ancillary powers which you thought might at some future time be desired to be carried out. I don't want you to come once for all and ask for an extended memorandum covering every conceivable alteration in the business of the company.....""

In fact Neville, J., had observed earlier at the same page of the report:

"If the circumstances of the company change, they can always come and ask reasonably to enlarge their memorandum."

This decision was given in the year 1914.

7. The other decision required to be noticed is *In re., Parent Tyre Co. Ltd.*, 1923 2 Ch 222 (B), which appears to be an authority for the proposition that the

additional business which a company, by an alteration of its objects is enabled to carry on, may be a business wholly different from and bearing no relation to the then existing business of the company and yet be capable of being conveniently or advantageously combined with it, provided such new business is not destructive of or inconsistent with the existing business. Whether the proposed new business is one which may be conveniently or advantageously combined with the then existing business of the company is primarily a question for the determination by the company's managers and share-holders. In that case of Parent Tyre Co. Ltd. (B), however, the business that was sought to be introduced was one of bankers and financiers in the existing business of the company which consisted in the holding and management of large investments in two other companies. That alteration was not so astonishing and amazing as the alteration proposed originally by the special resolution in this case before me. Lawrence, J., at p. 228 of the report, in construing Section 9(1)(d) of the Companies (Consolidation) Act, 1908, observes:

"I have come to the conclusion that, although the businesses there described are, in my opinion, a new departure, in the sense that they do not fall within the memorandum as at present drawn and are businesses which have no definite relation to the present business of the company, yet, in my judgment, this fact is not fatal to the introduction of the additional objects enumerated in the special resolution. The question whether any given additional business is one which may conveniently or advantageously be combined with the business of the company carried on at the time when the special resolution is passed must, in my judgment, be determined by the persons engaged in the business of the company. It is essentially a business proposition, whether an additional business can or cannot be conveniently or advantageously carried on under existing circumstances with the business of the company. The additional business, of course, must not be destructive or inconsistent with the existing business: it must leave the existing business substantially what it was before."

8. I arrive at a similar conclusion from a construction and interpretation of the language of Section 17(1)(d) of the Companies Act, 1956. That provision says that the memorandum may be altered with respect to the objects of the company to enable it to carry on "some business". The words "some business" in that clause apparently must include business other than the business which is already being carried on under the existing memorandum. Therefore, the addition of "some business" may be the addition of a business which is entirely a new departure from the business already carried on. The only requirement of the Statute law in India is that such business must be one which can (1) conveniently or advantageously be combined with the business of the company, and (2) that this must be so under the existing circumstances and not under hypothetical circumstances. So long as these two limits are observed, I should think that the share-holders and the management of the company should be left free to add to or reduce their business by suitable alterations in their memorandum.

9. The next English decision is *In re., Bolsom Bros. (1928) Ltd.*, 1935 1 Ch 413 (C). That decision is an authority for the proposition that new businesses of retail trades and of universal stores were allowed by the English Court to be added to the existing objects of the company of selling footwear and clothing by alteration of the Memorandum. The extension in that case was approved by the company in general meeting without opposition but the petition was opposed by certain preference share-holders. In the Court of the first instance it was held by Eve, J., that there was no evidence that the proposed alterations were necessary or proper to enable the company's business to be carried on more efficiently, and as the trades it was proposed to take power to work were entirely outside the original objects of the company, the Court would refuse to sanction the petition. There was an appeal, and on appeal additional evidence was adduced to show that a large number of the trades to which it was sought to extend the company's objects were already being carried on by the company, and that to this extent the object of the petition was to regularise the position. The Court of appeal came to the conclusion that in view of the further evidence the alterations in the objects, when limited so as to give power to carry on only those trades which were already being carried on by the company, should be sanctioned. In the present case before me it may be noted here that the business in ice plant and cold storage, had already been carried on for some years. It is interesting, however, to note that Lord Justice Maugham, at pp. 425 and 426 of the Report, went on to say:--

"I only wish to add that I do not in the least take the view that the learned Judge was wrong in dismissing the petition on the materials before him. The matter was brought before him under conditions which were exceedingly unsatisfactory. An order was asked for which involved the company being allowed to extend its memorandum so as to include a large number of businesses which obviously the company did not really decide or hope to carry on at any rate at the present time. For those reasons and for the reasons which Eve, J., gave, I think he was right, if I may express the opinion, in dismissing the petition; and, in taking the course which the Court of appeal is taking now, I also think it is true to say that we are not in any way throwing doubt upon the decision of Neville, J., and the statements he made in the well-known case of *In re., John Brown & Co. Ltd. (A)*, a case which people who are intending to launch a petition for the Court's approval of an alteration of their memorandum would be wise to bear in mind."

10. The principles of law regulating the formation of objects in the Memorandum of a Company and their alteration require clear enunciation and restatement in the present age of industrial growth and development of joint stock enterprise in India. Section 12 of the Companies Act, 1956, requires the requisite number of persons to subscribe their names to a Memorandum of Association as the mode of forming an incorporated Company. The requirements of this Memorandum are contained in Section 13 of that Act. One indispensable condition is that the Memorandum shall state the objects of the Company. Stating the objects of the Company in the Memorandum is not a mere legal technicality, but is a necessity

of great practical import. It is essential that the public who are called upon to subscribe to the capital of the company by purchase of its share should know clearly what are the objects for which they are paying and which they want to encourage. To give this necessary information, the statement of objects should be clear. It must not be too vague and too general and too wide for in that case it will defeat its very purpose and object. That is why it is not regarded permissible in law to have one solitary clause in the Memorandum of Association saying, "The Company will carry on all kinds of business" without stating what the kinds of business are. But this limitation does not mean that the Memorandum has to be a "Strait Jacket" without any flexibility. Great liberality of language and aspiration is accorded to a Memorandum of Association in stating its objects so long as they give reasonable information and indication of the business the Company intends to carry on. Section 14 of the Statute provides Tables and Forms as reasonable guides in this respect. In elucidating the principles of drawing up objects in the Memorandum and altering them, the next consideration is that the objects stated should be those which the Company intends to carry out in near and reasonable future. They should not be too remote objects for a too remote future and mere possibilities in some distant and uncertain time. This creates no handicap for the Companies because they can always come at any time for sanctioning any necessary alteration of the Memorandum whenever there is the need for it. All this is in the best interest of the Company and ultimately for the protection of the interests of the shareholders against Directors embarking on spurious and doubtful business and squandering Company's trading funds under the cover of vague and ambiguous object clauses in the Memorandum, and whom the shareholders might otherwise find difficult to control or manage by reason of the operation of the whip of majority which Directors will normally be expected to (sic) is the reason why the new Company legislation in India has made special provisions in particular relation to objects clauses in the Memorandum as distinguished from other clauses in the same Memorandum. A glance at the provisions contained in Section 16 of the Companies Act, 1956, makes it clear. Those provisions which are required by law to be stated in the Memorandum by Section 13 or any other section of the Companies Act, 1956, are expressly treated as conditions by Section 16(2) of the Act and cannot be altered except as provided expressly by the Act, while other provisions including those for appointment of Managing Directors, etc., are allowed to be altered in the same manner as the Articles as provided in Section 16(3) of the Statute. Reading Sections 13 and 16 of the Companies Act, 1956, together, it is clear that the objects clauses in the Memorandum are treated as conditions of the Memorandum and, therefore, can be altered only according to express provisions of the Statute which again are contained in Section 17 thereof. The law, therefore, attaches greater sanctity to the objects clauses of the Memorandum. The procedure in India under the Companies Act, 1956, for changing objects in the Memorandum is by special resolution confirmed by Court u/s 17 of the Act. By express statutory provisions contained in Section 17(2) and Section 17(5), the alteration shall not take effect

until, and except in so far as, it is confirmed by the Court on petition, and the Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions, if any, as it thinks fit.

11. Apparently, the Companies Act, 1956, in India has not adopted the modern English Law on the subject. In England the power to alter the objects of the Company was first given by the Companies (Memorandum of Association) Act, 1890, which allowed the provisions of the Memorandum to be altered for certain specified purposes by special resolution confirmed by the Court, and this power was extended from time to time. It was later found that the procedure for altering the objects in that manner was cumbersome and expensive and the alteration was seldom opposed. The Courts took little interest in England to scrutinise the proposed alterations and that apathy was not a little clue to the notion that it was Company's business to do what they liked. The whole of this branch of law in England has now been changed by Sections 76 and 77 of the Companies Act of 1947 now re-enacted in Section 5 of the Companies Act of 1948 in England. The present position in English Law is that the necessity for confirmation by the Court has been removed subject to the right of the objectors to petition for cancellation of the alteration. The onus, therefore, in England has shifted from the Companies and the Courts to the objectors to take the initiative of making an application to the Court objecting to the alteration. As a result of this new legislation, the practice under the older English Act of 1929 and the decisions on Section 5 of that Act have accordingly become obsolete and they only remain as useful guides for indicating now the grounds upon which perhaps an application to the Court in modern times to cancel the alteration would be likely to succeed in whole or in part. But the law in India has remained on the older keel. It may be that the Indian Parliament in its wisdom might have thought that share-holders in India today have neither the sense of responsibility nor the maturity of business experience of English share-holders to be left free to judge by themselves or on their own resources the ultimate desirability of altering so important a feature of the Companies as the objects of the Memorandum. Nevertheless, it may be said that the modern English procedure saves a good deal of time and expense both for the Companies and the Courts and thereby relieves them a good deal of their unnecessary work in many instances, and it may not be altogether unprofitable to examine the desirability of introducing a similar reform on this point in the Indian Company legislation.

12. On behalf of the Income Tax Authorities an affidavit has been filed, but the Revenue Authorities as creditors have not objected to the alteration of the Memorandum.

13. I, therefore, disallow the alterations except Clauses 21, 22 and 23 as proposed by the special resolution and appearing in Ex. "A" to the petition. These three Clauses 21, 22 and 23 are allowed to be added to the existing Memorandum of Association of the Company.

14. The Registrar of Joint Stock Companies will have his costs from the Company.

There will be no further order as to costs either in favour of the Revenue Authorities or in respect of the Company who will, therefore, bear their own costs.