(1961) 06 CAL CK 0004

In the Calcutta High Court

Case No : Company Petition No. 80 of 1960

In Re : Goneshberi Tea Co. Private Ltd.

Date of Decision : 16-06-1961

Acts Referred:
Companies Act, 1956 — Section 12, 12(1), 13, 17, 17(1)(a)
Insurance Act, 1938 — Section 27, 27A

Citation : 68 CWN 490

Hon'ble Judges : S.P. Mitra, J

Bench : Single Bench

Advocate : S.C. Sen for the company, for the Appellant;D.K. Sen for Sardarmall Bagaria, for the Respondent

Judgement

S.P. Mitra, J.—This is an application for an order that the additions and alterations of the company''s objects proposed to be effected by the Special Resolution at a General Meeting of the Company held on the 26th December, 1958 and set forth in paragraph 6 of the petition be confirmed by this court. The Special Resolution is as follows: -

That subject to the sanction of the Hon''ble Court at Calcutta, the following object-clauses be inserted in the memorandum of the company as sub-clauses (r(i)) and (r (ii)) of Clause 3 of the memorandum of association of the company respectively:-

''(r(i)) To contribute and/or subscribe to any charitable or other-funds not directly relating to the business of the company or the welfare of its employees as provided by section 293 (1) (e) of the Companies Act, 1956''.

''(r(ii)) To subscribe for, purchase or otherwise acquire and hold, sell, dispose of and deal in shares, stocks, Debentures Stocks or Securities of any company or of any authority Supreme, Municipal, Local or otherwise.''

As section 293 of the Companies Act, 1956, applies to a public company or a Private Company which is a subsidiary of a public company, it is obvious that, it cannot be attracted to the present case of a Private Limited Company. But Mr. S.

C. Sen, learned counsel for the company, has invited me to impose the limits prescribed by 293(1) (c) of the Companies Act, 1956, as to the quantum of contribution or subscription. Mr. Sen has also said that if this proposal does not appeal to me I may impose such restrictions as I may choose.

2. It is stated in the petition that the proposed extension of the objects of the company is required to enable the company to carry on its business more conveniently, advantageously and efficiently than before. The company has no debenture debt nor any other debt nor any creditor except the Punjab National Bank Limited, the Central Bank of India Limited and the Bank of India Limited. These creditors have no objection to the order being made.

3. In the petition the reasons for the additions and alterations proposed have not been stated. Under the direction of this court a supplementary affidavit has been filed setting out the reasons on behalf of the company. This is the affidavit of Hariprosad Kanoi, a Director of the company, affirmed on the 19th December, 1960. With reference to sub-clause (r (i)) it is stated in this affidavit that the company is often required to contribute or subscribe to various charitable and other funds including Labour Welfare Funds organised by various parties or organisations such as the Indian National Trade Union Congress, the Indian National Congress, the Assam Chah Mozdoor Sangha and the Assam Chah Karamachari Sangha. Almost all the labourers of the company are associated with one or the other of such parties and organisations. Accordingly in view of the conditions of labour such power is essentially necessary for smooth working of the company. Further, in the absence of such a provision the company will either have to get each and every contribution so made, ratified by the shareholders or to obtain prior sanction of the shareholders in General Meetings. Both the procedures are expensive and troublesome and are not feasible for practical purposes.

4. This application is being opposed by Sardarmal Bagaria who is a registered holder of 630 shares of Rs. 10/- each. Hariprosad Kanoi in his said affidavit refers to a letter of Bagaria dated the 24th November, 1960 in which he informed the company''s Board of Directors that he does not object to contribution to political parties.

5. With reference to sub-clause (r (ii)) Hariprosad stated that these objects are necessary for conveniently and advantageously carrying on the business of the company in the following amongst other circumstances:-

(a) The company has not got any further lands for expanding its present tea business. The company can do so only by purchasing suitable new tea gardens with sufficient virgin lands and not otherwise.

(b) New tea gardens can be acquired only by two ways:-

(i) by purchase from the Owner company or (ii) by acquiring controlling shares of the owner company. It has been found that a large amount is required to make a direct purchase of a tea garden besides huge amount of stamp duty and registration expenses; whereas by investing a lesser sum, sometimes even less than half in the purchase of controlling shares of the Owner company management of a tea garden may very easily be taken over or the business carried on in conjunction and more efficiently. By the second method stamp duty of twelve annas per cent is payable as against one rupee and a half per cent, in the case of a sale deed and there are no registration expenses at all.

(c) Sometimes large sums of moneys may remain idle in the hands of the company. For such moneys the company can earn only a small amount by way of interest. The company can invest surplus moneys profitably in the purchase of debentures, equity shares and other good securities of reputed companies and corporations, of the Port Trust and of the Government.

(d) It is prevalent among tea companies to invest and deal in shares and securities. On enquiry it has been found that several reputed tea companies make these investments. Their names have been set out in paragraph 3(f) of the affidavit.

(e) Twelve other companies under the same management have obtained sanction from its court on the 2nd May, 1960 for similar alterations in their respective memoranda of association. A list of these companies have been given in paragraph 3 (g) of the affidavit.

6. Mr. D. K. Sen appearing on behalf of Sardarmall Bagaria has first of all raised certain procedural objections. He says that the Companies (Court) Rules, 1959 came into operation on the 1st October, 1959. This application was made on the 22nd September, 1959. It is therefore governed by the Old Original Side Rules of this court. He has especially relied on Rules 19 to 30 of the Old Rules and his contention is that the petitioner has not complied with these rules.

7. Learned counsel for the respondent has argued further that, following the well known English decisions In re: Cyclists'' Touring Club (1) (1907) 1 Ch. 269 and In re: Omnfum Investment Co. (2) 2 Ch. 127 the petitioner should have placed before this court (a) a true copy of the notice calling for the meeting; (b) a true copy of the Special Resolution sanctioning the alteration; (c) the minute book of the company containing the minutes of the meeting at which the Special Resolution was passed, and (d) an affidavit by the Chairman of the meeting., This English practice has been incorporated in the Companies (Court) Rules, 1959 vide Rules 22, 38, Appendix II, and paragraphs 1 and 5 in Form No. 12.

8. Firstly, the old rules of the Original Side on which learned counsel relies apply to cases of reduction of Capital and not to applications for alteration of the Memorandum. Secondly, I find that, the petition was verified by an affidavit of Hariprosad Kanoi, a director of the company, affirmed on the 22nd September, 1959, but the summons was not taken out till the 22nd March, 1960 when the Companies (Court) Rules 1959 had come into poeration. I have looked into the original summons, the certified copy of the Special Resolution annexed thereto

and the supporting affidavit of Hariprosad Kanoi affirmed on the 15th March, 1960. I am satisfied that the requirements of Rules 22 and 38 of the Companies (Court) Rules, 1959 have been complied with in the instant case.

9. I now proceed to discuss the merits of the case. Under sec. 17 (1) (a) and (d) of the Companies Act 1956 a company may, by special resolution, alter the provisions of its memorandum with respect to the object of the company so far as may be required to enable it (1) to carry on its business more economically or more efficiently and (2) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company.''

10. Mr. D.K. Sen has also referred to section 17(1) (e) which provides that the memorandum may be altered to restrict or abandon any of the company''s objects specified therein. According to learned counsel in a case of restriction or abandonment of object the court has wider powers. In all other cases the court should be cautious so that the main object of the company are not lightly interfered with. Reliance was placed in this connection on the observations of P. B. Mukharji, J. In the matter of In Re: Bhutoria Brothers (Private) Ltd., that "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 allows 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 court took little interest in England to scrutinise the proposed alterations and that apathy was not a little due to the notion that it was the company''s business to do what they liked. The whole of the 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 alterations. The onus, therefore, has shifted from the Companies and the courts to the objectors to take the initative in 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......"

11. Mr. Sen has strongly urged that courts in India still have the residuary power to see the view of the shareholders is sensible.

12. Learned counsel for the respondent then proceeded to offer his comments on the supplementary affidavit of Hariprosad Kanoi affirmed on the 19th December, 1960 in which the reasons for the proposed alterations have been advanced. It is contended that the objects which the company proposes to achieve by sub-clause (r(ii)) can very well be attained through sub-clauses (i) and (r) of clause 3 of the Memorandum. Sub-clause (i) enables the company "to invest the money and assets of the company upon such securities or otherwise in such manner as may from time to time be determined." Sub-clause (r) enables the company "to pay for any lands and real or personal, movable or immovable estate or property or assets of any kind acquired or to be acquired by the company, or for any services rendered by, or to be rendered to, the company, and generally to pay or discharge any consideration to be paid or given by the company in money or in share or stock or debenture or debenture stock or obligation of the company or partly in one way and partly in another or otherwise however, with power to issue any shares or stocks as fully or partially paid up." If the company wants to purchase any shares in other tea companies; shares being movable properties can be purchased under sub-clause (r). It appears therefore, according to Mr. Sen, that the proposed sub-clause (r(ii)) is wholly unnecessary; yet the company wishes to introduce it because its whole purpose is to avoid the payment of stamp duty and registration expenses in an attempt to secure control over other tea companies. The Memorandum as it now stands permits acquisition of these shares in an honorable way. But now the company wishes to adopt dishonorable tactics. In paragraph 3(f) of this affidavit it is stated that tea companies now-a-days invest and deal in shares and securities, the names of some of these companies have been mentioned and the petitioner craves leave to refer to their balance sheets. Mr. Sen submits that it is no use looking into these balance sheets; the respective Memoranda of Association would have to be considered. Moreover, simply because other tea companies have been given the right to make these investments does not mean that the same right should be granted to the petitioner.

13. With regard to contributions to charitable or other funds envisaged by the proposed sub-clause (r (i)) Mr. Sen has urged that this alteration does not come within the scope of section 17(1) (a) as it is not required to carry on the business of the company "more economically or more efficiently." The words within quotation are not exclusive but complimentary. The point is whether the company can be run more economically without contribution to charitable or other funds. Secondly, reference has been made in the proposed sub-clause (r(i)) to section 293(1) (e) of the Companies Act, 1956 which has no application to a Private Limited Company. It applies only to a public company or a private company which Is a subsidiary of a public company. In this view of the matter,

contends Mr. Sen, the alteration proposed in subclause (r(i)) would be ultra vires the Companies Act, 1956.

14. Now, with respect to the necessity for sub-clause (r(ii)) it appears that, the company''s intention is to purchase shares in other tea companies. It was at one time supposed to be ultra vires for one company to take shares in another, but the contrary is now well-settled, provided that, the Memorandum gives the requisite power; but very clear words are necessary to enable a company to enter into partnership with another company or person, or to take shares in another company. The powers should be expressly conferred by the Memorandum of Association, though the power to acquire or hold shares may be implied from the nature of the company''s business. It is not enough that the company has power "to invest or deal with the moneys of the company not immediately required in any manner". The company should have specific powers "to take, (subscribe for) or otherwise q acquire, and hold shares (stocks, debentures or other securities) of any other company having objects altogether or in part similar to those of the company, or carrying on any business capable of being conducted so as directly or indirectly to benefit the company": vide Palmer''s Company Precedents, 17th Edition, Part I, pages 305 and 306.

15. In this state of the law I have to overrule the contention of learned counsel for the respondent that the proposed sub-clause (''r(ii)) is wholly unnecessary. I do not find in subclause (i) and (r) of clause 3 of the Memorandum of this company any specific powers to take shares in another company. Consideration like avoidance of stamp duties or registration expenses appear to me to be immaterial as I do not find in Hariprosad''s affidavit affirmed on the 19th December, 1960 anything to indicate that the company wishes to carry on its business illegally or that it proposes to acquire controlling shares in other tea companies unlawfully.

16. I have already referred to the judgment of P. B. Mukharji, J. In the matter of In Re: Bhutoria Brothers (Private) Ltd., . With reference to the construction and interpretation of the language of section 17 (1) (b) His Lordship has observed at page 903 as follows:

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 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.

17. To my mind the petitioner in the instant case does not seek to exceed the limits prescribed by His Lordship.

18. In Re: Indian Iron and Steel Co. Ltd., P. B. Mukharji, J. has observed that "under section 17 of the Companies Act, 1956 it is the courts'' business to sanction the amendment of the memorandum and that the legislative provision implies that the wisdom of the shareholders is neither supreme nor impeccable and for good reasons or bad it has to be passed by such wisdom as the courts possess. The decision on this application for the present must depend on the actual provisions of the Companies Act, 1956 and their interpretation. If the Companies Act, 1956 permits such alteration and if the Constitution of India does not prevent it then no further question....arises and the amendment of the memorandum must have to be allowed and sanctioned although even then the court can impose any terms and conditions as it thinks fit."

19. It is to be seen therefore whether there is any legal bar to the acquisition of shares by one company in another company. Under the Companies Act 1956 a "subsidiary company" or "subsidiary" means a subsidiary company within the meaning of section 4: Vide section 2 (47). The meaning of a subsidiary company given in section 4 makes it quite clear that the Company Law permits these acquisitions. In section 19 of the Banking Companies Act 1949 restrictions have been imposed on the nature of subsidiary companies a banking company can form. In sections 27 and 27A of the Insurance Act, 1938 also elaborate provisions have been made regarding the nature of investments of an Insurer. So far as the present company is concerned my attention has not been drawn to any such legal restrictions. In re New West minister Brewery Co. Limited (4) 105 Law Times 946 it has been held that the court, u/s 91 of the Companies (Consolidation) Act, 1908, may sanction very extensive alteration of the object of a company including a power to purchase other undertakings, a power to amalgamate with other undertakings and a power of sale of the whole undertaking of the company. A power to lease the whole undertaking of the Company could also be sanctioned u/s 91: vide Re Anglo-American Telegraph Co. Ltd. (6) 105 Law Times 947.

20. In view of the averments in paragraph 3 of the supplementary affidavit of Hariprosad Kanoi affirmed on the 19th December, 1960 and upon consideration of the authorities on this point I do not find any reason to refuse the addition or alteration asked for in the proposed sub-clause (r (ii)) of Clause 3 of the Memorandum.

21. I shall now deal with the objections of learned counsel for the respondent to sub-clause (r(i)). It is true that neither section 293 nor section 293-A applies to a Private Company. Is it therefore illegal for a Private Company to provide for contribution or subscription to any charitable or other fund? Section 293-A has been introduced by the Companies (Amendment) Act, 1960. Prior to this Act

there was no specific provision to enable a company to make political contributions. The Indian Iron & Steel Company Limited made an application to this court in 1957 for sanction of alteration of the Memorandum enabling the company to subscribe, inter alia to political funds. In the case reported in In Re: Indian Iron and Steel Co. Ltd., (which I have already noted in another connection) P. B. Mukharji, J. observed at page 236 as follows:

A company under the Companies Act means a company formed and registered under the Act or an existing company as defined in section 3 of the statute. The statute lays down no limitation about the object and purposes of a company except that the purpose of a company must always be ''lawful purpose'' as provided in section 12 of the Act. Section 12 of the Companies Act provides that any seven or more persons or where the company to be formed will be a Private Company any two or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association and otherwise complying with the requirement of the Act in respect of legislation, form an incorporated company with or without limited liability.

***

According to my interpretation contribution to political fund or political object is not legally prohibited and therefore such a contribution is within the meaning of the expression of ''lawful purpose'' in section 12 (1) of the Act. To draw a distinction between the word ''purpose'' in section 12(1) of the Act and the word ''objects'' in section 13 of the Act is to attempt to make a distinction without a difference.

The purpose in this context is the object and the object is the purpose. To distinguish between the purpose and object on the ground of what is main and what is subsidiary is not to draw a distinction on principle but to attempt a difference in degree for which I see no practical utility. My construction is that whatever purpose is not prohibited by law remains a ''lawful purpose'' within the meaning of section 12 of the Act.

22. The Tata Iron & Steel Company made an application to the Bombay High Court with the same end in view. In Jayantilal Ranchhoddas Koticha and Others Vs. Tata Iron and Steel Co. Ltd., Chagla, C.J. has expressed the view that it is axiomatic that what an individual can lawfully do can be done by a Joint Stock Corporation. There is nothing to prevent an individual from making any contribution, however large, to the political funds of a party, and if an individual can contribute to the political funds of a party, in law it is difficult to understand how a company can be prevented from doing so.

23. The same conclusion was reached by the Madras High Court In re Sri Natesar Spinning and Weaving Mills Private Limited, (8) AIR 1960 Mad 257, Rameswami, J. observes at page 260 as follows:

It is not disputed that similar companies in coimbatore District have subscribed funds to political parties. Therefore, when we have this important factor before us, namely, that the share-holders of the company after consiering the pros and cons of the matter have agreed that the funds of the company may be utilised for contribution to the funds of a political party it does not seem to be right to me to take a view with regard to the company''s activities different from the view taken by the shareholders when that view is not opposed to law and falls within the provisions of the Companies Act.

24. These observations were made by the learned Judges of the Calcutta, Bombay and Madras High Courts when section 293-A of the Companies Act had not been introduced by the Amendment Act of 1960. Mr. Sen, learned counsel for the respondent, contends that in the case of a purely private company, the question has to be examined anew; and unless the materials before the court are sufficient for the court to come to the conclusion that it must come u/s 17 (1) (a), without the aid of section 293, no sanction ought to be granted by the court. I see no reason why a distinction should be made between a public and a private company so far as this particular question is concerned. If it is lawful for an individual or a public company to contribute to charitable and other funds it cannot be unlawful for a private company to do so. Contribution to charitable and other funds by a private company, in my opinion, comes within the meaning of the expression "Lawful purpose" in section 12 of the Companies Act, 1956.

25. The reason why the company seeks this alteration has been stated in paragraph 2 of the affidavit of Hariprosad Kanoi affirmed on the 19th December, 1960. Commenting on the company''s proposal to contribute to Labour Welfare Funds Mr. D.K. Sen submits that Labour unrest can be eliminated by adopting other methods. If the shareholders of the company after considering all relevant factors are of opinion that by making contributions to such funds they would satisfy various aspirations of the workers and ensure smooth running of the company I do not think it would be proper for the court to impose its own view, if any, on them.

26. The objections of learned counsel for the respondent to the proposed subclause (r(i)) are therefore overruled. But in sanctioning this alteration I shall impose terms and conditions which I shall indicate later in this judgment.

27. There is one other point which remains to be disposed of, Sardarmall Bagaria in paragraph 4 of his affidavit affirmed on the 3rd June, 1960 has stated that he did not receive any notice of the Annual General Meeting in which the Special Resolution was passed. In his affidavit affirmed on the 1st July, 1960 Hariprosad Kanoi states that notice of this meeting was sent to Sardarmull Bagaria to his address at Nijan Tea Estate, Dibrugarh under certificate of posting: vide paragraph 4. A copy of the certificate has been annexed to this affidavit. u/s 53 (2) (b) (i) of the Companies Act where a document is sent by post, service thereof shall be deemed to have been effected in the case of a notice of a meeting, at the expiration of forty-eight hours after the letter containing the same is posted.

28. Assuming that Sardarmall Bagaria did not in fact receive the notice, section 172(3) provides that, the accidental omission to give notice to, or the non-receipt of notice by, any member or other persons to whom it should be given shall not invalidate the proceedings at the meeting. This contention of the respondent therefore is of no substance.

29. In the result, I confirm sub-clause (r(ii)) in paragraph 6 of the petition. I also make an order confirming subclause (r(i)) in the following form:-

(r(i))--To contribute and/or subscribe to any charitable or other funds not directly relating to the business of the company or the welfare of its employees;

Provided that such contribution and/or subscription shall not exceed fifteen thousand Rupees, or five per cent, of the company''s average net profit as determined in accordance with the provisions of sections 349 and 350 of the Companies Act, 1956 during the three financial years immediately preceding, whichever is greater;

Provided further that the company shall show in its balance sheet and profit and loss accounts every year single contribution directly or indirectly made to any charitable or other funds by name, and the amount and date of contribution and or subscription.

Each party will bear and pay its own costs of this application.

