

(1995) 08 BOM CK 0024

In the Bombay High Court

Case No : Company Application No. 272 of 1995 in Company Petition No. 331 of 1985

Jetu Jacques Taru Lalvani and another

APPELLANT

Vs

J.B.A. Printing Inks Limited and others

RESPONDENT

Date of Decision : 21-08-1995

Acts Referred:

Companies Act, 1956 — Section 177, 179, 31, 397, 398

Citation : (1996) 2 BomCR 593 : (1997) 97 BOMLR 566 : (1997) 88 CompCas 759

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : K.S. Cooper, Mudnani, Soli K. Cooper, V.R. Dhond and Ms. Madhavi Goradia, instructed by Kanga and Co, for the Appellant; Virag Tulzapurkar and Mody, instructed by Wadia Ghandy and Co. and E.P. Bharucha, D. Merchant, Kevic Setalvad and Mrs. Laxmi Mankar, instructed by Nanu Hormasjee and Co., for the Respondent

Judgement

A.P. Shah, J.—This company application taken out by the original petitioners seeks leave to amend the company petition and further seeks interim injunction to restrain the respondent from acting on the resolution passed in the extraordinary general meeting of the first respondent company dated April 17, 1995, and issuing or allotting bonus or rights shares in pursuance of the said resolution.

2. Briefly stated, the facts giving rise to this company application are as follows :

Respondent No. 1-company was set up in 1950. Respondent No. 1 was initially incorporated as a private limited company. It became a deemed public limited company in 1968. The company manufactures printing inks at its units located in Bombay, Calcutta, Madras, Ahmedabad and Delhi. There is five families in control of the company, namely, (a) Mirchandani, (b) Advani, (c) Malkani G.H., (d) Malkani T.L. and (e) Lalwani. The families of Advani and Lalvani hold about 62

per cent. of the shareholding and the remaining shares are held by the other families. Each of the aforesaid families also held equal shares in a company called J.B. Advani and Company Ltd., which was a holding company of Advani Oerlikon Ltd. The petitioners who are the members of the Lalvani family have filed the company petition under sections 433, 439, 397, 398, 402 and 403 of the Companies Act, 1956, on various grounds set out in the petition. Broadly, it is the case of petitioners that the respondents by a series of actions have sought to oppress the minority shareholders and have been acting against the interest of the company.

First, I will deal with certain developments which took place during the pendency of the petition which have an important bearing on the controversy raised in the present application. A notice dated April 5, 1989, was issued by the company for an extraordinary general meeting of the company to be held on May 12, 1989, in which there was a resolution proposed resolving that the company had ceased to be a private limited company by virtue of section 43A of the Act and it became a public limited company and to adopt the articles of association of the company as proposed in substitution for and to the exclusion of all the articles thereof. Prior to the meeting, the petitioners by their letter dated May 5, 1989, informed the company that the petitioner are against the passing of the said resolution. At the said extraordinary general meeting held on May 12, 1989, all the resolutions including for making the company a public company and for substitution of a new set of articles of association were passed on a show of hands with the requisite majority u/s 177 of the Act. There is no dispute that the second petitioner who attended the meeting did not demand a poll.

The petitioner subsequently wrote a letter dated July 8, 1989, to the company stating that the minutes of the extraordinary general meeting held on May 12, 1989, were not correctly recorded. He stated that it is not understood as to how the special resolutions have been passed without the requisite majority. He further stated that the petitioners represent 31.2 per cent. shareholders and he having voted against the item at the extraordinary general meeting, no resolution could validly have been passed in the said meeting. Petitioner No. 2 also addressed a letter dated May 17, 1989, to the Controller of Capital Issues, placing his version as to what transpired in the said meeting held on May 12, 1989. The Department of Company Affairs by a letter dated October 4, 1991, asked the company for an explanation in the matter. The company replied by their letter dated October 10, 1991. Admittedly, the Department of Company Affairs has not taken any action in the matter. The petitioners have not thereafter made any grievance about the passing of the resolution in the said extraordinary general meeting till March, 1995. Now, I shall narrate the events which promoted the petitioners to file the present company application.

The company issued a notice dated March 20, 1995, of an extraordinary general meeting to be held on April 17, 1995, for passing of the resolutions including transfer of the reserve fund of Rs. 44,00,000 to share capital against which the

company proposed to issue 4,40,000 new equity shares of Rs. 10 each in the proportion of one equity share of Rs. 10 each for every existing fully paid equity share of the company and for issue of rights to the equity shareholders. In the proposed resolution it is, inter alia, provided that the offer of rights shares shall include the right exercisable by the shareholders concerned to renounce the shares offered to them in whole or in part in favour of any other person subject to the approval of the board. The resolutions were passed in the extraordinary general meeting held on April 17, 1995.

The petitioners seek to challenge the resolutions passed in meeting of April 17, 1995, mainly on two grounds. Firstly, they say that the resolutions are passed in the extraordinary general meeting of April 17, 1995, on the basis that the company has already become a public limited company by virtue of the resolution passed in the extraordinary general meeting of May 12, 1989, but since the said resolution in the extraordinary general meeting of April 17, 1995, are also liable to be declared as illegal and invalid. The second ground is that the passing of such resolutions is mala fide and the only object is to compel the minority to relinquish their shareholding in the company.

Before I deal with the main grounds agitated by the petitioners, it will be necessary to refer briefly to the defences raised by the respondents. It is the case of the respondents that the resolution converting the company into a public limited company was validly passed in the extraordinary general meeting of 1989. It is also the case of the respondents that the resolutions passed in the 1995 meeting are in the interest of the company. The respondents say that the company is about 50 years old with outdated machinery and technology and requires substantial financial input if it is to survive and grow in today's highly competitive and globalised economy. The respondents point out that in the new liberalised economic scenario, the company has reached a level where it needs to expand to else it will lead to extinction which can cause loss or damage not only to the shareholders but public financial institutions, banks, employees, creditor and various other Government agencies like Income Tax. In paragraph 19, 20 and 21 of their affidavit-in-reply, the respondents have explained why the company has decided to increase the share capital. The respondents say that the resolution was passed in the best interest of the company and it is not open to the petitioners to challenge its validity in the present proceedings. They point out that the resolutions passed in 1989 are being challenged for the first time in 1995 only with a view to create obstacles in the expansion programme undertaken by the company.

Mr. Cooper, learned counsel for the petitioner, strenuously urged that the resolution of making the company a public limited company passed in the extraordinary general meeting of 1989 is not validly passed. Mr. Cooper urged that the petitioners represent 31.2 per cent. of the shareholding and since the second petitioner voted against the resolution, the same cannot be said to have been validly passed u/s 31 of the Act which requires such resolution to be passed

by not less than three times number of votes against the resolution. Mr. Cooper also urged that though the second petitioner did not ask for poll, the chairman was under a legal duty not to give effect to the ruling since he was obliged to take into consideration the fact that the petitioners who were holding a 31.2 per cent. shareholding were against the resolution. In view of this admitted position, says Mr. Cooper, the chairman ought to have demanded the poll even though no such request was made by petitioner No. 2. Mr. Cooper placed heavy reliance on the judgment of the Chancery Division in *Second Consolidated Trust Ltd. v. Ceylon Amalgamated Tea and Rubber Estates Ltd.* [1943] 2 All ER 567.

2. There is no dispute that the extraordinary general meeting of the company which was held on May 12, 1989, was attended by four persons, namely, T.L. Malkani, A.B. Advani, Nina Mirchandani and T.J. Lalwani, i.e., petitioner No. 2. Ms. Advani proposed the name of Mr. Malkani to be in the chair in the absence of Mr. G.H. Malkani, chairman of the company, which was seconded by Mrs. Mirchandani and approved by the second petitioner. Ms. Advani proposed the following resolution as a special resolution which was seconded by Mrs. Mirchandani :

"Resolved that the authorised capital of the company be increased from Rs. 25,00,000 dividend into 25,000 equity share of Rs. 100 each of Rs. 5,00,00,000 dividend into 50,00,000 equity shares of Rs. 10 each ranking pari passu with the existing shares of the company."

3. The resolution was put to vote. Mr. Malkani and Ms. Advani and Mrs. Mirchandani voted for it while the second petitioner voted against the resolution. The chairman declared the special resolution carried with the requisite majority. Section 177 of the Companies Act provides that at any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded u/s 179, be decided on a show of hands. In taking a vote by show of hands, the duty of the chairman unless the articles otherwise provide, is to count the hands held up and to declare the resolution accordingly, without regard to the number of votes that a member possesses and without regard to proxies, whether held by members for the other members or by non-members for members. The procedure followed in the general meeting is succinctly summarised in Ramaiya's Companies Act (thirteenth edition, page 1149) :

"The procedure usually followed is that a resolution is proposed either by the chairman or some other member and is seconded by some one who is member (including the chairman if he had not proposed the resolution). Unless the articles so require, seconding is not essential. A proposal put to the meeting is open to discussion and after the discussion is closed, the chairman puts the resolution to vote and after counting the numbers for and against, declares the result. In the meantime, if a poll is demanded, the procedure prescribed in the sections next following is followed."

4. Section 179 specifically provides that before or on the declaration of the result

of the voting on any resolution on a show of hands, poll may be ordered to be taken by the chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf by the persons mentioned in section 179. When a poll is duly demanded it must be taken, and in such case, the meeting is deemed to subsist and continue until the poll is taken. Thus, it was open to petitioner No. 2 to demand a poll and in case such demand had been made, it was obligatory for the chairman to take the poll. Petitioner No. 2 is not a layman or a novice. In fact, he was the managing director of the company for quite some time. Therefore, he must be presumed to be aware of his rights under the Act. But for the reasons best known to him, petitioner No. 2 did not demand the poll. In these circumstances, it is not possible to entertain a belated challenge to the resolution after a lapse of nearly six years.

5. Turning then to the arguments of Mr. Cooper that it was the duty of the chairman to demand the poll, I do not find any provision either in the Act and the Rules or the articles of association which cast such obligation on the chairman of the meeting. It is not possible to agree with Mr. Cooper that in every meeting it is necessary for the chairman to ascertain the sense of the meeting by ordering a poll, although in a given case the situation may be such that an obligation on the part of the chairman could be spelt out. In my opinion, the reliance placed on the decision in the *Second Consolidated's* case [1943] 2 All ER 567 is misconceived. The facts of the said case were rather peculiar and, therefore, I am reproducing the same in detail. There the defendant company wished to alter the conditions under which its debenture stock was held, pursuant to the provisions of the trust deed securing that stock. In order to do so it was necessary to pass an extraordinary resolution which was a resolution which had to be passed by a three-quarters majority at a duly convened meeting at which the holders of a clear majority in value of the stock were present in person or by proxy. The trust deed further stated that on a show of hands stockholder present only by proxy should not vote. The meeting was duly convened and with the notice thereof was sent a form of proxy to all the stockholders whereby they could indicate the specific manner in which they wished their votes to be used. At the meeting the fourteen persons present in person were unanimously in favour of the resolution, but they did not constitute a quorum unless the proxies were counted in. The proxies were such that, if a poll was demanded and the proxies used for the purpose of the vote, the resolution could not be passed. The resolution was passed by the stockholders present in person; the chairman, aware of all the facts and acting bona fide, did not demand a poll. The plaintiff stockholders contended that the meeting was not duly constituted, and, alternatively, that the proceedings were irregularly conducted and that the resolution was invalidly passed. In these circumstances, it was held by Uthwatt J. that upon the true construction of the trust deed the power of the chairman to demand a poll was not a personal right to be exercised according to his wishes. He was under a legal duty so to exercise that right that effect was given to the real sense of the meeting and, in the circumstances of this case, particularly in view of the fact

that the persons present did not form a quorum, the chairman ought to have demanded a poll and used the proxies. Thus, the observations of Uthwatt J. do not held the petitioners in any way and, therefore, their challenge to the resolution of 1989 must be rejected.

6. Mr. Cooper next urged that the whole object of the respondents is to embarrass the petitioners who are involved in litigation with the company as no outsider may be ready and willing to acquire the shares of the company which is incurring loss. Mr. Cooper pointed out that the petitioners will have to pay a hefty sum of nearly Rs. 85 lakhs for acquiring 8,24,800 rights shares. Mr. Cooper urged that even assuming that such resolution is in the interest of the company, it should not be allowed if it has the effect of virtually allowing the majority shareholders to take over the minority shareholdings. Mr. Cooper brought to my notice a judgement of Harman J. in *A Company, In re* [1985] B.C.L.C. 80. Mr. Cooper also invited my attention to the observations made by the Supreme Court in *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.* [1981] 51 Comp Cas 743: AIR 1981 SC 743, which read as follows :

"Every action in contravention of law may not per se be oppressive for the purpose of section 397 of the Companies Act, 1956; a resolution passed by the directors may be perfectly legal and yet oppressive and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company. An isolated act, which is contrary to law, may not necessarily by itself support the inference that the law was violated with the mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed."

7. In my opinion, the first and the foremost question to be considered in such cases is whether the impugned resolution is passed in the interest of the company. On a careful scrutiny of the record, I am fully satisfied that there is no oblique motive behind the resolution and the company is compelled to increase its share capital in view of the changing times. It has been pointed out by the respondents that they have to keep with the market requirements otherwise they will not be able to compete with the new entrants like Hindustan Inks, United Inks and Rainbow Inks. The respondents also pointed out that they are contemplating to enter into technical collaboration with the German company. The respondents rightly contend that in order to strengthen their products currently manufactured by the company and to concentrate on the manufacture of a wide variety of publishing inks it is necessary to increase the share capital. The directors of the company act in fiduciary capacity and if they in their discretion decide to issue shares for the purpose of raising funds, the main question for decision is whether the issuance of shares for the purpose of raising funds is in the interest of the company.

8. It will be useful to refer to a decision of the Supreme Court in *Nanlal Zaver and Another Vs. Bombay Life Assurance Co. Ltd. and Others*, . In *Nanlal*'s case, the Supreme Court, after considering various judgements of the English courts, held that if the directors exercise the power for the benefit of the company and at the same time they have a subsidiary notice which in no way affects the company or its interests or the existing shareholders then the very basis of interference of the court is absent. In paragraph 51 of this judgement, the Supreme Court observed as follows (at page 207 of *Comp Cas*) :

"On the facts of this case the concurrent findings is that the company was in need of funds and, therefore, the issue of further share was clearly necessary and in referable to such need. The further motive of keeping out the Singhanian group, who are yet shareholders but are strangers, does not prejudicially affect the company or the existing shareholders and the presence of such further motive cannot vitiate the goods motive of finding the necessary funds for the company. In my judgment it is impossible to hold that the issue of fresh shares was in the circumstances illegal or void."

9. I may also refer to the observations made by their Lordships of the Judicial Committee in *Hirsche v. Sims* [1894] AC 651:64 LJ PC 1 :

"If the true effect of the whole evidence is that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with *dolus malus* or breach of trust merely because in promoting the interest of the company they were also promoting their own, or because they afterwards sold shares at prices which gave them large profits."

10. *Palmer's Company Law*, 18th Edition, p. 183, says :

"In the exercising their powers, whether general or special, directors must always bear in mind that they are in a fiduciary position, and must exercise their powers for the benefit of the company, and for that alone."

11. Therefore, to my mind, the true test is whether the resolution is in the interest of the company and I have no hesitation to hold that the impugned resolution is in the interest of the company. Merely because the minority shareholders are required to make substantial payments for buying the shares, is not ground for branding the resolution as oppressive of the minority unless it is shown that the board of directors has acted with some oblique motive.

12. I may also mention that the decision in *A Company, In re* [1985] B.C.L.C. 80 of the Chancery Division relied upon by Mr. Cooper does not assist the petitioners. The facts of that case were : One L was a member of a company and had also been a director, but was removed from the board by a vote of the shareholders. Immediately after his removal, L presented a petition for relief u/s 75 of the Companies Act, 1948, or alternatively a just and equitable winding up. Subsequent to the presentation of the winding-up petition, an extraordinary

general meeting of the company was summoned for the purpose of increasing the capital of the company and conferring on the directors a power to allot the new shares. It was the intention of the majority shareholders, who were also directors but did not constitute a majority of the board, not to issue the shares other than as a rights issue for cash on a pro rata basis. L sought an injunction to restrain the majority summoned to increase the company's capital and to confer a power of allotment on the directors, pending the hearing of his petition. Harman J. granted interim injunction because the learned judge felt that the possibility of there being a third motive to enable a takeover bid by the majority of the shareholders could not be ruled out. Harman J. observed :

"At the moment, upon the evidence before me, I could not decided that this is in fact such a matter, but as it seems to me it is arguable that this is the correct view, and that upon discovery, cross-examination and so forth at trial, it may be established that the persons proposing this issue - the board of the company who have convened the meeting and who wish to have the power to allot - wish to have it for reasons which are nothing to do with the ostensible and apparent reasons which come to mind of a rights issue. The analogy, which is not perfect, with *Howard Smith Ltd. v. Ambol Petroleum Ltd.* [1974] AC 821: [1974] 1 All ER 1126, where directors were proposing to make an allotment, and had made an allotment, which was directly beneficial to the company which needed the money, and yet were held to have made the allotment improperly and in breach of their duty because they had yet a third motive, which was to enable a take-over bid to be made, seems to me to be one which might lead a judge on sufficient evidence to find that the proposals here were unfairly prejudicial to Mr. Lewis. It seems to me thus that there is an arguable case that jurisdiction exists u/s 75 to restrain a proposed pari passu rights issue, and, if that is so, then there must be jurisdiction upon this motion pending the hearing of the petition."

13. In these circumstances, the second contention of Mr. Cooper also fails.

14. In the result, the company application is dismissed with no order as to costs.

15. Ad interim relief to continue for a period of four weeks.

16. Certified copy expedited.