(1996) 07 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : O.M.P. No. 367 of 1995 in Civil Suit No. 209 of 1995

J.K. Puri and Others APPELLANT

Vs

H.P. State Industrial Development Corporation and Others RESPONDENT

Date of Decision : 10-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Companies Act, 1956 — Section 397, 398

Citation : (1998) 93 CompCas 491 : (1997) 1 ShimLC 385

Hon'ble Judges : Surinder Sarup, J

Bench : Single Bench

Advocate : R.L. Sood, for the Appellant; Asha M. Punchhi and K.D. Sood, for the Respondent

Final Decision : Dismissed

Judgement

Surinder Sarup, J.—The plaintiffs have filed a suit for the following reliefs :

That the transfers effected by defendant No. 2-company of the shares of defendant No. 1 in the meeting stated to be held on June 30, 1995, are illegal, ultra vires and void being against the provisions of the articles of association, with the consequential relief of mandatory injunction requiring the defendants to offer the aforesaid shares in favour of the plaintiffs in proportion to their holdings in accordance with the provisions of the articles of association of the company and the Companies Act and not to exercise any right of voting in respect of such shares alleged to have been transferred by defendant No. 1 in favour of defendants Nos. 3 to 5 in the meeting held on June 30, 1995.

2. Plaintiff No. 1, J.K. Puri has put forth himself as a widely travelled man having vast experience in the planning and promotion of hotels, having served the premier institution known throughout the world as "Oberoi Hotels". It is stated in the plaint that after serving the said institution, he retired in 1990, but continued his association with Oberoi Hotel, by virtue of being the President of the Hotel Oberoi Inter Continental Co-operative General Housing Society Ltd., as also being

the President of its Employees Welfare Association. It is further stated that he is a consultant to Span Resorts, Manali and Holiday Inn, both at Manali and Ahmedabad, respectively, Plaintiff No. 2, Concept Fabrics, is stated to be a company incorporated under the Indian Companies Act (hereinafter to be called "the Act"), and plaintiff No. 1, Shri J.K. Puri, is its managing director. Plaintiffs Nos. 3 to 5 are stated to be the shareholders, being the wife and two daughters, respectively of plaintiff No. 1.

3. Defendant No. 2, Kufri Hotels (P) Ltd., is also a company under the Act, being a private limited company, it is running a hotel/resort at Kufri, District Shimla. Defendant No. 1, H.P.S.I.D.C. was earlier a shareholder in Kufri Hotels, defendant No. 2 to the extent of 2,500 equity shares of Rs. 100 each worth Rs. 2,50,000. Defendant No. 3, Shri Dhian Chand, is the managing director and defendant No. 5, Shri Budhi Singh, is the executive director of defendant No. 2. Defendant No. 4, Smt. Meena Ranaut, is the wife of defendant No. 3.

4. At the time when the company, i.e., defendant No. 2 was floated, it raised certain loans from defendant No. 1 and for that purpose an agreement was entered into between them dated December 20, 1984, whereby defendant No. 1 agreed to buy the aforementioned shares, One of the clauses in the said agreement was that defendant No. 1 would not transfer its shares to any person for a period of five years from the date of the commercial production of the company, i.e., defendant No. 2, It was further provided in the agreement that defendant No. 1 would transfer its shares to the promoter on the terms and conditions as indicated in the said agreement with regard to the fixation of their price. According to the case of the plaintiffs, this agreement was in violation of Articles 13 and 14 of the memorandum and articles of association of the company-defendant No. 2.

5. It appears from the pleadings of the parties that some time in October, 1992, after correspondence and negotiations between them, some sort of agreement in the nature of a memorandum of understanding was signed whereby the plaintiffs and some other persons were inducted as shareholders in the company-defendant No. 2. Plaintiff No. 1 has gone on the record waxing eloquent about the appreciation of his services rendered by him to defendant No. 2, by the members of the board of directors of the said company. However, without going into any further unnecessary details, it would be sufficient to mention that the honeymoon between the parties from 1992 onwards, appears to have come to an end in 1995, when the relations inter se turned sour. Admittedly, a meeting of the board of directors was held on June 30, 1995, in which plaintiff No. 1, Shri J.K. Puri, was also present. At the said meeting the following share transfers were approved and registered by the board of directors unanimously :

Transferor

Transferee

No. of shares

Distinctive numbers

HPSIDC Ltd.

Sh. Dhian Chand

680

3841 to 4520

HPSIDC Ltd.

Mrs. Meena Ranaut

677

5031 to 5530 3664 to 3840

HPSIDC Ltd.

Sh. Budhi Singh

1143

3520 to 3520 3520 to 3663

Sh. I. P. Anand

Vipat Invest. (P) Ltd.

100

21186 to 21285

Sh. D. B. Malik

Sh. Dhian Chand

100

7436 to 7535

Sh. Surinder Aggarwal

Sh. Dhian Chand

100

6786 to 6885

Sh. Shyam Chopra

Sh. Dhian Chand

100

8136 to 8235

Ms. Sangeeta Chopra

Sh. Dhian Chand

100

8236 to 8535

Mrs. Brij Bala

Sh. Dhian Chand

100

8336 to 8435

Sh. P. N. Chandel

Sh. Dhian Chand Sh.

750

10116 to 10865

Ms. Neelam Bhardwaj

Dhian Chand Sh.

250

9866 to 10115

Mr. B. R. Patiyal

Sh.Dhian Chand

500

9366 to 9865

Mr. Arjun Chauhan

Dhian Chand

100

8856 to 8955

Ms. Sonam Chauhan

Sh. Dhian Chand

100

8756 to 8855

6. It is the case of the plaintiffs that the minutes of this meeting were wrongly recorded, inasmuch as plaintiff No. 1, though present at the meeting, had never agreed to the aforesaid transfer of shares. On the other hand, he had been insisting throughout that the transfer of shares should be in accordance with the

articles of association. According to the said articles, any transfer of shares, before being effected, was to be done by offering the shares proposed to be transferred to the members/shareholders of the company, defendant No. 2, in proportion to their shares. Hence, the present suit,

7. Along with the suit, the plaintiffs have also filed an application under Order 39, Rules 1 and 2 of the Civil Procedure Code, 1908, for an interim injunction against the defendants, restraining them from exercising their rights in respect of the 2500 shares which have been transferred by defendant No. 1 in favour of defendants Nos. 3 to 5, in the meeting of the board of directors dated June 30, 1995, during the pendency of the suit. This application has been filed on the same facts as stated in the plaint and discussed above. The application is supported by an affidavit of plaintiff No. 1.

8. In the written statement filed by defendants Nos. 2 to 5, preliminary objections have been taken, inter alia, that the plaintiffs have no cause of action ; the jurisdiction of the High Court cannot be invoked by way of the present suit, inasmuch as the allegations in the plaint, even if taken at their face value, constitute a cause of action for initiation of proceedings under Sections 397 and 398 of the Act; the plaintiffs are estopped by their own acts and conduct; the suit is vexatious, being a counter-blast to the decision taken by the board of directors of the company-defendant No. 2 in the meeting held on June 30, 1995 ; the suit is not properly valued for the purpose of jurisdiction and it is barred by limitation.

9. On the merits, it has been admitted in the written statement that an agreement was entered into on October 23, 1992, between defendant No. 2, i.e., the company and plaintiffs Nos. 1, 3 and 5. By virtue of this agreement, the said plaintiffs became shareholders in the company to the extent of 8,500 equity shares of Rs. 100 each collectively. The case of the defendants is that plaintiff No. 1 was inducted on the board of directors when he expressed his desire to be so inducted. Since he was purchasing the shares of the company, the board of directors decided to induct him as such.

10. The case of the defendants further is that right from the time of his induction as a shareholder, it was the effort of plaintiff No. 1 to gain a majority shareholding and to usurp the management from defendants Nos. 3 to 5 taking advantage of the heart problem of defendant No. 3, Shri Dhian Chand, who had to undergo a by-pass surgery in March, 1994, on account of which he could not devote his attention to the management of the hotel, and requested plaintiff No. 1 to look after its affairs, being a substantial shareholder and a director. In addition, plaintiff No. 1 persuaded defendant No. 3 to sign an agreement with him appointing him as a consultant on a fee of Rs. 25,000 per month or 3 per cent. of the gross revenue of the company, whichever was more. Notwithstanding this, however, plaintiff No. 1 did not render any effective or proper consultancy or any other service to the hotel. Rather, according to the defendants, plaintiff No. 1 started to dictate terms in the absence of defendant

No. 3 due to the letter''s illness. There are other averments in the written statement, which it is not necessary to reproduce or discuss for the purpose of deciding the interim injunction matter.

11. In the reply filed to the application under Order 39, Rules 1 and 2 of the Civil Procedure Code, 1908, of the plaintiff, defendants Nos. 2 to 5 have taken the same stand as they have done in the written statement as discussed above. To this reply, the plaintiffs have filed a rejoinder reiterating the stand taken in the plaint and in the application for interim injunction. Consequently defendants Nos. 2 to 5 have also filed a supplementary reply to the said rejoinder, annexing various documents, i.e., "X-1" to "X-7". Not letting the matter rest there, the plaintiffs have filed a detailed and meandering reply to the said supplementary reply of defendants Nos. 2 to 5.

12. Learned counsel for the parties have been heard at length, the hearing having been spread over a number of days. As is apparent from the prayer clause, in substance the plaintiffs are seeking an interim injunction for restraining defendants Nos. 3 to 5 from exercising any voting rights, or otherwise, with regard to the 2500 shares, which already stand transferred in favour of defendants Nos. 3 to 5 by defendant No. 1. In a nutshell, the plaintiffs are seeking the restoration of status quo ante in respect of the said 2500 shares which have admittedly been transferred by defendant No. 1 to defendants Nos. 3 to 5 in the meeting held on June 30, 1995. It is now to be seen whether such an interim injunction can be granted during the pendency of the suit in the given circumstances of this case.

13. The main thrust of the argument of learned counsel for the plaintiffs is that the transfer of shares being contrary to Article 13 of the articles of association of defendant No. 2, is non est. For facility of reference, Article 13 ibid is reproduced herebelow :

"A member intending to sell any shares shall give notice of his intention to do so to the directors who shall offer such shares to all the members in proportion to their respective holding in the company and may thereupon find one or more members willing to purchase the same. This shall be done within two months of receipt of such notice."

14. According to the submission of learned counsel, the shares of the corporation (defendant No. 1) had to be offered to the members/shareholders of defendant No. 2, in proportion to their shares and transferred accordingly. Thus, the impugned transfer of shares of defendant No. 1 to defendants Nos. 3 to 5 is palpably violative of Article 13.

15. On the other hand, it had been submitted by learned counsel appearing on behalf of the defendants, that Article 13 is not applicable in the present case, inasmuch as the transfer of shares under the buy-back agreement entered into between defendants Nos. 1 and 2 on December 20, 1984, it was clearly provided therein that defendant No. 1 would transfer its shares to the promoters, i.e.,

defendants Nos. 3 to 5 after the embargo for a period of five years from the date of the commercial production of the company-defendant No. 2 was over. In this connection, he has referred to Articles 5 and 10 of the articles of association of defendant No. 2, which are reproduced herebelow for facility of reference :

"5. Subject to the provisions of the Act and these articles, the shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons, on such terms and conditions and at such times as they may think fit.

10. Save as provided in Section 108 of the Act, no transfer of shares shall be registered unless a proper instrument of transfer, stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation of the transferee, has been delivered to the company together with the certificate or, if no such certificate be in existence, the letter of allotment of such shares in accordance with the provisions of Section 108 of the Act. The transferor shall be deemed to remain a member in respect of such shares until the name of the transferee shall have been entered in the register of members in respect thereof."

16. After bestowing considerable thought and deliberating on the rival contentions raised by learned counsel for both the parties, this court is of the view that at this stage, when the suit is at the very threshold, it would not be appropriate to decide this legal aspect, as it would prejudice the case of the parties one way or the other. What has to be seen at this stage is whether there is a prima facie case in favour of the plaintiffs, the balance of convenience also rests with them and irreparable loss and injury will be caused if the injunction prayed for is granted or not.

17. In order to establish a prima facie case, learned counsel for the plaintiffs has taken this court through all the documents on which they are placing reliance, the same being part of the record. In particular, he has referred to the affidavit of Parminder Kaushal (annexure "X-6" to the supplementary reply of defendants Nos. 2 to 5 in answer to the rejoinder of the plaintiff to the reply of the said defendants in answer to the plaintiffs'' application for interim injunction). The stand taken in this affidavit by the deponent, who professes to be the Assistant Manager (Accounts) of defendant No. 2 is that the minutes book regarding the proceedings of the various meetings of the board of directors of defendant No. 2 had been taken from him by plaintiff No, 1, Shri J.K. Puri some time in 1993, which this deponent missed to collect from him thereafter. According to learned counsel, this plea is an afterthought so as to cover the acts of malfeasance and misfeasance of defendants Nos. 3 to 5. This again is a matter of evidence, the stage for which has not yet arisen. Therefore, at this stage, from the material on the record, no finding can be given one way or the other without prejudicing the case of the other party to the dispute.

18. Learned counsel for the plaintiffs has referred to item No. 1 in the minutes of

the meeting held on September 20, 1993, and has submitted that it confirms to the minutes of the last meeting after they were read out by Shri Amar Chand Chauhan, who presided over the said meeting of the board of directors on September 20, 1993, From this, learned counsel would have the court infer that the minutes book was not lost, as deposed by Shri Parminder Kaushal in his affidavit, referred to above. Learned counsel has also referred to the statement in the affidavit of the said Shri Parminder Kaushal that FIR No. 14 was lodged in the Police Station, Dhalli, on February 2, 1995, regarding the loss of the minutes book containing the minutes of the meeting of the board of directors from December, 1990, to June, 1993. But in this connection, it needs to be pointed out that the said Shri Parminder Kaushal has also indicated in para. 7 that he has been regularly getting copies of notices and the minutes of the board of directors in a meeting file maintained by the office, and from where copies of the said notices and minutes have been supplied to the company-defendant No. 2, which have been filed in this court. This prima facie explains the source of the documents filed by the plaintiffs in this court, notwithstanding the loss of the minutes book as alleged by the deponent.

19. Learned counsel for the plaintiffs has referred to Section 293(1)(d) of the Act in support of his argument. However, a bare perusal of the said provision shows that the same is not applicable to the facts and circumstances in the present case. Learned counsel for the plaintiffs has relied on Mathrubhumi Printing and Publishing Co. Ltd. Vs. Vardhaman Publishers Ltd. and Others, the apex court judgments reported as Bajaj Auto Ltd. v. N.K. Firodia [1971] 41 CompCas 1 and LIC of India v. Escorts Ltd. [1986] 59 CompCas 548.

20. In the first cited ruling of the Kerala High Court, it has been laid down that the power of a company to alter the articles of association by a special resolution is wide, but it cannot be exercised to oppress minority shareholders. Applying this ruling to the facts of the present case, it is no doubt true that in view of the transfer of 2500 equity shares originally purchased by the corporation, defendant No. 1, in consequence of the agreement between it and defendant No. 2 dated December 20, 1984, to the promoters of the company, has rendered the plaintiffs as minority shareholders, but in this very ruling it has also been held that such minority shareholders can enforce their rights u/s 397/398 of the Act before the Company Law Board for relief in cases of oppression. Thus, if the plaintiffs consider themselves to be oppressed minority shareholders in consequence of the impugned transfer of the shares referred to above, they have a remedy under the Act before the Company Law Board to enforce their right.

21. In so far as Bajaj Auto Ltd. Vs. N.K. Firodia and Another etc., is concerned, the same does not apply to the facts and circumstances of this case. With regard to the decision of the apex court, i.e., LIC v. Escorts Ltd. [1986] 59 CompCas 548 : [1986] 1 SCC 284, learned counsel for the plaintiffs has drawn the attention of this court and has pointedly relied on para. 95 of the judgment at page 339. In order to appreciate the import of this part of the decision of the

apex court, para. 95 ibid is reproduced herebelow in toto (page 631 of 59 Comp Cas) :

"95. A company is, in some respects, an institution like a State functioning under its ''basic Constitution'' consisting of the Companies Act and the memorandum of association. Carrying the analogy of constitutional law a little further, Gower describes ''the members in general meeting'' and the directorate as the two primary organs of a company and compares them with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the directors will be answerable to ''Parliament'' constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two-man companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the directors the right to exercise all the company''s powers except such as the genera] law expressly provides must be exercised in general meeting (Gower''s Principles of Modern Company Law). Of course, powers which are strictly legislative are not affected by the conferment of powers on the directors as Section 51 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. But a perusal of the provisions of the Companies Act itself makes it clear that in many ways the position of the directorate vis-a-vis the company is more powerful than that of the Government vis-a-vis Parliament. The strict theory of the Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exercisable by the directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the directorate and appoint others in their place, or alter the articles so as to restrict the powers of the directors for the future. Gower himself recognises that the analogy of the Legislature and the executive in relation to the members in general meeting and the directors of a company is an over-simplification and states ''to some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution''. As already noticed, the only effective way the members in general meeting can exercise their control over the directorate in a democratic manner is to alter the articles so as to restrict the powers of the directors for the future or to dismiss the directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another,"

22. It is clear from the observations contained therein that the position of the board of directors vis-a-vis the company is more powerful than that of the Government vis-a-vis Parliament. It has further been observed by the apex court that (page 632 of 59 Comp Cas) : "the only effective way the members in general meeting can exercise their control over the directorate in a democratic manner is to alter the articles so as to restrict the powers of the directors for the future . . ." Therefore, on the facts of the present case, as discernible from the record, it is apparent that the board of directors of defendant No. 2 has exercised its powers in the meeting held on June 30, 1995, according to the articles of association and as per the terms of the agreement entered into between defendant No. 1 and defendant No. 2 on December 20, 1984.

23. The plaintiffs have challenged the veracity of the minutes of the said meeting dated June 30, 1995, on the ground that they were wrongly recorded, because plaintiff No. 1, though present, had never agreed to the transfer of 2,500 equity shares earlier purchased by defendant No. 1, to the promoters of defendant No. 2. This again is a matter of evidence, the stage for which has not yet arrived. In the given circumstances of the case, as at present discernible from the record, it would neither be possible nor appropriate to give a finding one way or the other on this contentious issue.

24. A perusal of the minutes of the meeting of the board of directors of defendant No. 2 held on June 30, 1995, indicates that the presence of plaintiff No. 1 at this meeting is recorded. Item No. 2 therein indicates that the transfer of shares of defendant No. 1, as per the buy-back agreement, was discussed in detail and Shri J.K. Puri told the members that since these transfers placed before the board for registration were old, therefore, he had no objection for these transfers of shares. He further said that it does not affect him. In consequence of this, share transfers were approved and registered by the board of directors unanimously as per the chart reproduced earlier in this order. Significantly, this matter was also one of the items in the agenda of the meeting of the board of directors earlier held on March 26, 1995. A perusal of the minutes of that meeting indicates that as per item No. 4, defendant No. 3 placed before the board the share transfer forms duly filled in and signed by transferor-defendant No. 1 as per the buy-back agreement. Although it was unanimously approved, on the request of Shri Taranjit Singh, through his representative, Shri Kulbeer Singh, who wanted further clarification, the matter was deferred to the next board meeting. Admittedly, plaintiff No. 1, Shri J.K. Puri was also present at this meeting held on March 26, 1995. Therefore, prima facie, it appears that although he was present at both these meetings, i.e., held on March 26, 1995, and June 30, 1995, he raised no objection to the transfer of the shares of defendant No. 1 to defendants Nos. 3 to 5. Copies of the minutes of both these meetings are part of the documents filed on behalf of the plaintiffs in this case.

25. As per the agreement between defendants Nos. 1 and 2 dated December 20, 1984, defendant No, 1 had agreed to transfer its shares to the promoters of the

company-defendant No. 2 after a period of five years from the date of the commercial production of the company. This clause of the agreement has now been challenged on the ground that it is in violation of Articles 13 and 14 of the articles of association of defendant No. 2. The plaintiffs having been inducted as shareholders in 1992, did not raise such objection in respect of the said clause in the said agreement. Not only that, plaintiff No. 1 was even made a director of the company. It is too much to believe that he had no knowledge of the said agreement dated December 20, 1984, for all these three years from 1992 to 1995.

26. It is clear from the above discussion that the plaintiffs have not been able to make out a prima facie case in their favour. In the circumstances of the case, the balance of convenience also does not rest with them. No irreparable loss or injury will be caused if the injunction prayed for is not granted during the pendency of the suit, because if the plaintiffs ultimately succeed in getting a decree, as prayed for in the suit, the transfer of shares of defendant No. 1 to the promoters of the company-defendant No. 2 will be struck down. On the other hand, if the interim injunction prayed for by the plaintiffs is granted during the pendency of the suit, it will have the effect of nullifying the transfer of the shares already effected by the meeting of the board of directors dated June 30, 1995, before the present suit was filed. Moreover, it would be tantamount to keeping the shares thus transferred in abeyance, leading to further complications in the day-to-day management of the company-defendant No. 2.

27. On behalf of the defendants, their learned counsel has cited Mukandlal Manchanda v. Prakash Roadlines Ltd. . It has been laid down therein by the Karnataka High Court that where the petitioners were present at a meeting of the board of directors in which a resolution was passed approving transfer of shares to certain members/ directors, and the former did not protest at that time against the said transfer, they are not entitled to invoke the summary jurisdiction of the court. He has also cited Cane v. Jones [1981] 1 All ER 533 (Ch D). On the facts of that case it was held that the passing of a resolution whereby an agreement was followed, was effective to override the articles of association of a company. Learned counsel for the defendants has relied on these two decisions for the proposition that the buy-back agreement between defendants Nos. 1 and 2 dated December 20, 1984, would have the effect of overriding Article 13 of the articles of association in the present case. Moreover, plaintiff No. 1, though present in the meeting held on June 30, 1995, did not object to the transfer of shares of defendant No. 1 to the promoters of the company, namely, defendants Nos. 3 to 5, Thus, plaintiff No. 1 waived his right to invoke the provisions of Article 13 ibid.

28. For the reasons recorded above, the plaintiffs are not entitled to the interim injunction prayed for in the circumstances of the case. Their prayer to that effect is consequently declined and the application filed by them for that purpose is dismissed and disposed of accordingly. There will be no order as to costs. It is

made clear that the observations, reasons and findings hereinbefore will not be deemed as an expression of opinion on the merits of the case and will have no bearing on the ultimate decision of the suit.

