

(1952) 10 MAD CK 0014

In the Madras High Court

Case No : Appeal No. 166 of 1951 and C.M.P. No. 10856 of 1952

Mothey Krishna Rao

APPELLANT

Vs

Grandhi Anjaneyulu and Others

RESPONDENT

Date of Decision : 29-10-1952

Acts Referred:

Companies Act, 1913 — Section 21
Criminal Procedure Code, 1898 (CrPC) — Section 145
Specific Relief Act, 1877 — Section 21, 42

Citation : AIR 1954 Mad 113 : (1953) 23 CompCas 90 : (1953) 1 MLJ 781

Hon'ble Judges : Mack, J; Krishnaswami Nayudu, J

Bench : Division Bench

Advocate : M. Dwarkanath, for the Appellant; C.A. Vaidyalingam, T. Venkatadri and K. Ramachandra Rao, for the Respondent

Final Decision : Dismissed

Judgement

1. Appellant, Mothey Krishna Rao, is the plaintiff, whose suit for a declaration that ""he is the Secretary and Treasurer of Sri Krishna Jute Mills Ltd.

Eluru"" has been dismissed with costs by the learned Additional Subordinate Judge of Eluru. Defendants 1 to 4 were Directors of this company

when on 1-7-1950 a meeting of the Board ended in disorder and confusion which necessitated police intervention to restore order. According to

the plaint, after the regular business on the agenda had been done, defendants 1 to 4 wanted other matters brought up, which led to this fiasco.

After the plaintiff left the room, defendants 1 to 4 passed a resolution co-opting defendant 5 as director, suspending the plaintiff from the post of

Secretary and Treasurer and appointing defendant 2 to look after the duties of Secretary and Treasurer temporarily. Plaintiff filed a petition u/s

144, Cri. P. C. in the Stationary Sub-Magistrate's Court and obtained an order in

his favour, which was vacated by the High Court on 24-8-

1950. Ex. A-5 is a letter written by defendant 2 as Chairman of the Board and Secretary and Treasurer to the plaintiff forwarding to him copy of

the Board's resolution, which found him guilty of certain charges, suspended him from acting as Secretary and Treasurer, with a recommendation

for his outright dismissal to an extraordinary general body meeting to be convened for the purpose along with the annual general body meeting to

be held during the year. This course, however, was not adopted and on 25-7-1950 the Board removed the plaintiff from the post of Secretary.

This suit was filed on 1-10-1950.

2. The scope of the suit is very limited and confined to the Articles of Association of the Company. Plaintiff has not sued for damages for wrongful

removal or dismissal, but for a declaration that he still continues to be the Secretary and Treasurer on the ground that the Board had no power to

remove him under the Articles of Association. There has been no argument before us at all on the merits of the removal of the plaintiff or as regards

any alleged misconduct by him, which justified his removal. Mr. Thiruvengkatachari for the appellant took his stand on this pure question of law that

under the Articles of Association the Board of Directors was not competent to remove the plaintiff, and that the only competent authority, which

could remove him was the general body of shareholders by a special resolution at an extraordinary general meeting.

3. To appreciate this contention, it is necessary to consider the relevant articles and the genesis of the plaintiff's appointment as Secretary and

Treasurer. This company was formed in 1904 and under Article 111, plaintiff's uncle Mothey Ganga-razu and Venkata Subbarao were the first

Joint Secretaries and Treasurers of the company. The article contained an important proviso, that it shall be lawful for the company to remove them

and appoint others in their place by resolution passed at an extraordinary general meeting by a majority of not less than three-fourths of the

shareholders of the company. Article 114 regulated the remuneration of the Joint Secretaries, Treasurers and Manager. In 1935 at an

extraordinary general meeting, a new Article 114 was substituted fixing the remuneration for Secretaries and Treasurers at 9 per cent. on the net

profits or Rs. 4000 a year, whichever is higher. Under Article 114-A, the plaintiff Mothey Krishna Rao was appointed working Secretary and

Treasurer entitled to draw the whole of this remuneration. Article 111 was hot itself amended till 12-3-1938 also by a resolution at an

extraordinary general meeting. In its place was substituted the following: ""Mr, Mothey Krishna Rao, Zamindar, Eluru shall be the sole Secretary

and Treasurer."" At that same meeting, there was an amendment to Article 114 entitling him to remuneration of only a commission of 9 per cent on

the net profits of the company. It is noteworthy that the proviso to Article 111 that the original Joint Secretaries and Treasurers could not be

removed, except by a re-dolution at an extraordinary general meeting was specifically deleted when the plaintiff was appointed sole Secretary and

Treasurer.

4. The plaint case is based entirely on the legal position sought to be made out of the fact that by this combination of circumstances the

appointment of the plaintiff as sole Secretary and Treasurer was in fact from 1938, Article 111. It is common ground that plaintiff is himself a

substantial shareholder and that the company did not itself run the Jute Mills from 1940 since when it had been annually leased out to the East India

Commercial Company, Calcutta. There was, therefore, apparently not much day-to-day business for the sole Secretary to do.

5. The short point for consideration is the legal effect of the Memorandum and the Articles of Association. u/s 21, Indian Companies Act,

The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had

been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives, to observe all the

provisions of the Memorandum and of the Articles, subject to the provisions of this Act.

There, is "long catena of English decisions, which have unhesitatingly laid down that not only a third party, but even a shareholder cannot sue the

company on anything contained in the Articles, treating the Articles as a contract by the company with him, and that it is incumbent on the party

suing to make cut a contract outside and independently of the articles. In the earliest case -- "Eley v. Positive Govt. Security Life Assurance Co.

Ltd.", (1876) 1 Ex D 88 on appeal from (1816) 1 Ex 20 (A), the articles contained a clause providing that A should be employed for life as

Solicitor for the company and should not be removed except for misconduct. He took Office and later became a shareholder. The company

discontinued his employment. While still a shareholder, he sued in damages for breach of contract. It was held that no action lay. The Court of

Appeal disposed of the matter summarily, Lord Cairns L. C. refusing the plaintiff relief observing that the articles were an agreement "inter socios"

whereas the appointment of Eley as Solicitor for life in the articles so far as he was concerned was "res inter alios acta". Eley had advanced a sum

of £1/2. 200 to be expended in the formation of the company and the company-promoter arranged that he should be appointed permanent solicitor

for life.

This view was followed in -- "Brown v. La Trinidad", (1887) 37 Ch. D. 1 (B), -- "Hickman v. Kent". (1915) 1 Ch. 881 (C) and -- "Beattle v.

Beattle Ltd.", 1938 Ch. 708 (D) and in a number of other decisions, which need not be specifically cited. In -- "(191B) 1 Ch. 881 (C)", the

authorities as to whether the articles constitute contract as between the company and its members were reviewed by Astbury J. who decided that

the result of apparently conflicting decisions and dicta was that though the articles can neither constitute a contract between the company and an

outsider, nor give any individual member of the company special contractual rights beyond those of the members, generally, they do in fact

constitute a contract between a company and its members in respect of their ordinary rights as members (See Buckley's Companies Act, 11th

Edn. page 35).

6. Palmer has at pp. 30 and 31 of his Company Law, 19th Edn., indicated the difficulty of reconciling the rule in these cases with Section 20 of the

English Act of 1948 which corresponds to Section 21 of our Act. There have been a series of cases in which Courts have inferred from the

articles them-selves implied contracts. In the case of -- "Swabey v. Port Darwin Gold Mining Co.", (1889) 1 Meg. 385 (E), the articles provided

for the payment to each Director by way of remuneration of a specified sum per annum. The company reduced this by a special resolution,

whereupon the plaintiff resigned and sued the company for three months"

remuneration for services prior to the date of his resignation. The Court held that he was entitled to recover on the footing of an implied contract in the terms of the clause. "The articles", said Lord Esher, "do not themselves form a contract but from them you get the terms upon which the Director is serving." The articles undoubtedly constitute evidence in a wide field such as the terms of remuneration of Managing Director, Secretaries, Treasurers and so on. Palmer has observed at p. 31 that the question whether an implied contract so entered into was capable of being varied by the company against the will of the other party has not been finally decided and he has cited decisions, which appear to take different views. A discussion of those decisions would not be relevant for purposes of the present appeal. We have been referred to no decision either in English or in Indian law in which a shareholder has succeeded, after removal from an office in the company, in obtaining a declaration that such removal was invalid and that despite it he continues to hold the office.

7. Mr. Thiruvengatachari for the appellant has taken his stand on the basis that as the plaintiff was appointed by a special resolution at an extraordinary general body meeting, that is the only authority which can legally remove him according to the articles of association. Mr.

Thyagarajan for the defendants has argued contra that the Directors of the company have full powers to remove the Secretary by virtue of Article

112, which defines the wide powers of Joint Secretaries and Treasurers, inter alia, to appoint, to remove or suspend Managers, Engineers, clerks

and so on upon such terms and conditions as they shall think proper, subject of course to the general control of the Board of Directors. Article 99

confers on Directors all powers, which are not expressly directed to be exercised by the company in general meeting. Mr. Thyagarajan urges that

the proviso to the original Article 111 having been specifically omitted, the plaintiff is bereft of any protection even under the articles, and that the

Board had full powers to remove him as secretary. He also argued that Managing Agents can u/s 87/B(f), Companies Act be removed only

subject to approval by a resolution at a general meeting of the company and that no such statutory protection is given to a mere Secretary, As

regards the contention that the plaintiff, having been appointed by a special

resolution at an extraordinary general meeting can only be removed by the authority who appointed him and not by the Board of Directors, it would indeed appear that this was also the view taken by the Board itself when in their original resolution contained in the letter EX. A. 5 communicating to the plaintiff his suspension, they recommended his outright dismissal to be given effect to at a general body meeting. This recommendation however was not implemented before this suit was filed and we have instead the Board itself just suspending ""him"" and then removing him outright.

8. The plaintiff is also, by virtue of his position as Secretary, an ex-officio Director under Article 82. A Director may be removed under Article 96

only by a resolution at an extraordinary general body meeting with a three-fourths majority in accordance also with Section 86-G, companies Act.

We do not think that it is necessary for us to decide in this suit as framed whether the Board of Directors at a meeting was competent to remove

the plaintiff from the post of Secretary and Treasurer and whether this can only be validly done by a special resolution at an extraordinary general

body meeting. The plaintiff has sued only in his capacity as Secretary and Treasurer and as Mr. Thyagarajan has urged, his position as Director is

derived from his appointment as secretary. We find on the pure question of law, on which this appeal is pressed, that the plaintiff has no cause of

action against the company as such on the basis of the Articles of Association and that his appointment as Secretary must be regarded as one "de

hors" the articles and governed by an independent contract as between the plaintiff and the company, as regards which, there is no other evidence

apart from the articles themselves.

9. In -- "Ramkumar Potdar v. Sholapur Spinning & Weaving Co. Ltd.", AIR 1934 Bom 427 (F), a Bench of the Bombay High Court held that the

Court does not interfere with the internal management of the affairs of a company and that, if a majority of shareholders consider that a particular

contract of employment should be terminated, the Court would not ordinarily consider the matter at the instance of a minority of shareholders. It

further held that the memorandum of association of a limited company does not constitute a contract between the company and the third party,

who may be mentioned therein and that the Court would not make an order, the

effect of which would be to enforce specifically a contract of personal service.

In this suit filed for a bare declaration, there are two other hurdles in the way of a Court giving plaintiff any relief. Plaintiff has not sued for damages

in breach of contract but for a declaration without any consequential relief, which is in "prima facie" violation of the proviso to Section 42, Specific

Relief Act. Section 42 gives the Court discretion to declare a person entitled to any legal character or to right as to any property, with a proviso

that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. In

the present suit, the plaintiff has not asked for relief by way of damages consequent on the wrongful termination of his services as Secretary and

Treasurer, which is a normal relief claimed in cases where the services of a servant or employee are wrongfully terminated.

Mr. Thiruvengkatachari has sought to draw a fine distinction between the case of a person who has been removed by an authority incompetent to

do so and by a person wrongfully removed by a competent authority. In the present case, however, the incompetence of the Board of Directors is

sought to be inferred from the Articles of Association themselves, which plaintiff cannot, for this purpose invoke so as to give him a cause of

action. The learned Subordinate Judge found that the suit for a mere declaration was-maintainable on the very curious ground that as the company

property was in "custodia legis" of the Sub-Divisional Magistrate, Eluru in Section 145 proceedings in M. C. No. 53 of 1950, it was not in the

possession of the defendants and, therefore, it was not possible for the plaintiff to ask for consequential possession. The proviso to Section 42,

Specific Relief Act cannot be bypassed in this manner. When a dispute between two parties gives rise to proceedings u/s 145, Cri. P. C. the

property falls only temporarily under magisterial control subject to the rights of the parties being determined by a civil Court. The pendency of

those proceedings will not make this suit for mere declaration maintainable.

10. It is urged that there are some decisions in which Courts have granted relief by way of mere declaration in case of removal from an office. We

have been referred to the Privy Council decision in -- AIR 1948 121 (Privy Council) Mr. Lall, a member of the Indian Civil service, was dismissed

from service on certain charges. He filed a suit, which was tried by a Bench of the Lahore High Court in the first instance in which he asked for a

declaration that his removal was "ultra vires" and invalid u/s 240, Government of India Act and for consequential relief that he still continued to be

a member of the Indian Civil Service and was entitled to all the rights and privileges attaching to the office. The High Court gave him only the

declaration he sought: (see -- "I. M. Lall v. Secy. of State", AIR 1944 Lah 240 (H) and, on appeal, the Federal Court, while confirming the

declaration that his removal was wrongful, permitted him to amend his plaint with a consequential relief for damages and remitted it to the trial

Court for further disposal, the judgment being reported in -- AIR 1945 47 (Federal Court) . Their Lordships of the Privy Council in an appeal

against the decision of the Federal Court merely granted a declaration that the order dismissing Mr. Lall was void and inoperative and that he

continued to be a member of the Indian Civil Service. No consequential relief was given to him on the ground that a member of the Indian Civil

Service, for reasons which we need not go into here, had no statutory right to institute a suit for the recovery of arrears of salary and emoluments.

There were special circumstances in that case in which the Court proceeded on the presumption that the Secretary of State for India and the

Government of India would abide by and act upon the Court declaration by reinstating Mr. Lall without any consequential relief by way of a

specific Court order against them.

We cannot take that decision as an authority for bypassing the proviso to Section 42, Specific Relief Act and as general authority for Courts to

make declarations where the plaintiff being able to seek further relief omits to do so. In order to meet this technical defect in the plaint, Mr. Thiru-

venkatachari at the close of the arguments filed a petition for permission to amend the plaint for the following consequential relief viz., an injunction

restraining the defendants from interfering with the plaintiff's exercise of powers and duties as Secretary and Treasurer of Sri Krishna Jute Mills

Ltd., Eluru. Normally, we would not hesitate to grant an amendment of this sort even at this late stage, if it is intended to overcome a mere

technicality. We have decided to allow this amendment, though belated, but we find that the effect of it is really to magnify another hurdle, which

confronts the plaintiff in his search for Court relief.

11. This is Section 21, Specific Relief Act which sets out contracts, which cannot be specifically enforced. One such category is Section 2(b)

which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the court cannot enforce

specific performance of its material terms. The declaration sought by the plaintiff with the consequential relief he belatedly asks for is really

tantamount to specific performances of a contract of personal service.

12. It is regrettable that the Board did not call for an extraordinary general body meeting to ratify their action in accordance with their own

declared intention in Ex. A. 5. It is brought to our notice that in a petition filed by the appellant, a commissioner was appointed by this Court on 2-

5-51 to prepare a list of all documents and registers and that he was discharged on 2-8-1951 by Panchapakesa Aiyar J. In an appeal against that

order, Govinda Menon J. and Ramaswami Gounder 3. appointed a Receiver, who called a general body meeting at which six directors were re-

elected. It is sufficient to say that during all this period, defendant 2 continued to function as Secretary and Treasurer. What happened subsequent

to the suit is quite immaterial and can-not affect its merits.

13. For reasons given supra, it is quite impossible for us to give the plaintiff any relief in the plaint as framed and on the footing on which he has

come to Court. We dismiss his appeal, but we consider this to be a fit case in which the parties should be directed to bear their own costs

throughout and direct accordingly.