

(2005) 04 CAL CK 0049
In the Calcutta High Court
Case No : GA No. 4408 in CS No. 326 of 2004

Pawan Jain and Others

APPELLANT

Vs

Hindusthan Club Limited and Others

RESPONDENT

Date of Decision : 29-04-2005

Acts Referred:

Companies Act, 1956 — Section 227, 274, 274(1), 274(3)
Companies Rules, 2003 — Rule 2, 3, 5, 9

Citation : (2005) 5 CompLJ 1 : (2005) 62 SCL 610

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Bhaskar Sen, Desal Banerjee, P.C. Sen, S.B. Mukherjee, for the Appellant;

Judgement

Kalyan Jyoti Sengupta, J.—This motion has been taken out for interlocutory relief of order of prohibitory injunction restraining the defendants and each of them and/or by their servants and agents or assigns or otherwise from denying, the plaintiffs or any of them the right as nominees and to contest election for the post of Executive Committee members at the AGM [annual general meeting] of the company scheduled to be held on 18 December 2004, and for mandatory injunction commanding the defendants to permit the plaintiffs and each of them to contest the election for the posts of the Executive Committee members of the company to be held on 18 December 2004 and also for appointment of an independent person to conduct or supervise or oversee the annual general meeting of the defendant No. 1 to be held on 18 December 2004. This application has arisen out of a suit for declaration that the plaintiffs are, and each of them is entitled to be, eligible for contesting the election for the post of Executive Committee member of the company at the AGM of the company scheduled to be held on 18 December 2004 and for other appropriate consequential reliefs.

1.1 The short facts of the case are stated hereunder. The plaintiffs and each of

them are undisputedly permanent members of the defendant No. 1, club. In terms of the rules and regulations of the club-each and every year annual general meeting and the election of the Executive Committees are held, and from and amongst them office bearers of the club for the next year are selected. By notice dated 9 November 2004-annual general meeting of the defendant No. 1 was convened and to be held on 18 December 2004 to transact the following business:

(i) To receive, consider and adopt the audited balance sheet as at 31 March 2004 and the profit and loss account for year ended on the date and reports of the Committee and auditors thereon.

(ii) To appoint auditors for the year 2004-05 and fix their remuneration.

(iii) Election and balloting.

(iv) To announce the results of the election of the office bearers and Committee Members.

On the same date, a circular was issued inviting proposals/nominations for election of the office bearers and the Executive Committee members for the year, 2004-05. In terms of the club Executive Committee appoint honorary Election Officer for conducting election. In terms of the notice, the nominations were to reach at the office of the club at 7 p.m. on 26 November 2004 and the last date of withdrawal was up to 7 pm on 29 November 2004. On the same date printed copies of the annual accounts of the club along with the auditors' report were circulated amongst the members of the club. In the auditors' report accompanying the circular, it was stated that none of the Committee members is disqualified as on 31 March 2004 from being appointed as Committee members in terms of Clause (g) of Sub-section (1) of Section 274 of the Companies Act, 1956. Plaintiffs duly filed their nomination papers for contesting the election along with other candidates. After scrutiny, 36 nominations including those of the plaintiffs for election as Committee members for the above year were found valid and such names were published on the notice board of the club. After declaring the nominations to be valid all of a sudden on 7 December 2004 an undated erratum was put up on the notice board of the club stating that there has been an omission in Clause 4(e) of the auditors' report and such omission purported to show that the nomination of 12 members including the plaintiffs were declared invalid. This erratum was not considered at any meeting of the Committee members nor was it placed at any meeting of the Committee members. On 13 December 2004-all the plaintiffs filed Form DD-A and obtained receipts of the same. In spite of the aforesaid fact and compliance of all the requirements-the Election Officer reported to the President/honorary Secretary and the candidates of the club that as all the nominations received by the club up to 26 November 2004 were not accompanied by the mandatory declaration u/s 274[(1)](g) of the Companies Act, all the nominations were invalid."

2. In the body of the plaint and petition, I find the plaintiffs have challenged the

aforesaid decision of the Election Officer.

3. At the interim stage, the plaintiffs obtained an interim order on 17 December 2004 passed by the Hon"ble Justice Subhro Kamal Mukherjee staying the operation of the decision of the Election Officer dated 15 December 2004 rejecting the nomination papers of the candidates for election of the office bearers at the annual general meeting and restrained the club from holding election of office bearers until further orders.

3.1 This interim order was not appealed against and the same is still valid and subsisting.

4. Mr. S.B. Mukherjee, learned senior counsel appearing for the plaintiffs/petitioners, contends that the subsequent decision of the Election Officer is illegal, invalid and arbitrary as after scrutinising all the nomination papers including those of the plaintiffs and after having found the same being valid, it was not open to them to cancel the same on the plea as mentioned in the subsequent notice. In the relevant Rules, nowhere it provides that each and every candidate has to file declaration in Form DD-A under the provision of Section 274, Sub-section (1), of the Companies Act, 1956. The relevant clause only says that nomination papers are to be scrutinised and validity has to be ascertained and nothing else. The aforesaid Section 274, Sub-section (1), Clause (g), of the Companies Act, 1956 came into being subsequently in the statute book whereas the election rules were framed long time back, as such, he contends the same has no application in this club. I am unable to accept this contention of Mr. SB. Mukherjee as this provision will not be applicable in this club for any statutory amendment is to take effect and to be applied the moment it is given effect to or retrospectively as the intention of the Legislature will command.

5. Moreover, that any rules or bye-laws of any club are always subject to the laws framed by the sovereign authority is the basic principle of good government. Therefore, I hold that this provision of this section is applicable in this club.

6. His next contention is that the subsequent erratum of the auditors in its report is a manipulated one and the same will appear from the following facts, viz., the report is dated 9 November 2004. The auditor is certifying that none of the Committee members was disqualified as on 31 March 2004 of the aforesaid section. The nominations were invited to be filed by a circular letter issued by the Committee on 9 November 2004 by 26 November 2004. Therefore, on 9 November 2004, which is the date of the Auditors' report, the nominations had not been filed. The ground for rejection of the nomination papers was that the same was not accompanied by declaration u/s 274(1)(g). In this background, it is difficult to imagine how could the auditors on 9 November 2004, say, that these members were disqualified when the nomination papers had not been filed at all. In other words, he contends, the first portion of the Auditors' report does

not tally with the latter portion because the disqualification requires a certificate from the auditor as of the last date of the financial year, that is to say, on 31 March 2004. Moreover, even on 29 November 2004-the nomination for election was found to be valid and the purported rejection was on 15 December 2004. He further submits that filing of declaration in the above form is one thing and holding directors' disqualification under the aforesaid section is another thing.

7. In any view of the matter--when the requisite declaration in Form DD-A was filed long before holding of the meeting on 18 December 2004--it was not open for the Election Officer to cancel all the nominations. Such a decision smacks of something other than bona fides and lawful decision. He contends that requirement of filing declaration in the above form is applicable to those directors who are the directors of the public company. Under such circumstances, he submits that this decision should be set aside and the club should be directed to hold the annual general meeting which has been suspended and to hold election by appointing an independent person as an Election Officer and to observe and supervise the same.

8. Mr. P.C. Sen, learned senior counsel appearing for the defendant Nos. 1, 2 and 3, submits, firstly, that this court has no territorial jurisdiction to entertain, try and determine the instant suit in view of the fact that the entire cause of action as pleaded in the plaint has arisen outside the territorial jurisdiction of this court. The respondent No. 1 club, is situated at 4/1, Sarat Bose Road, Calcutta 700 020 outside the territorial jurisdiction of this court. He contends that the nominations filed by the respective candidates, including the plaintiffs, have lawfully and rightly been rejected by the Election Officer. He contends that in order to contest the election, a candidate must file a valid nomination under the club rules. According to him, the validity pertains also to compliance of the provisions of Section 274(1)(g) of the Companies Act, 1956 read with Rule 9 of the Companies (Disqualification of Directors u/s 274(1)(g) of the Companies Act, 1956) Rules, 2003. Under this provision, it is obligatory for every director in a public company registered under the Companies Act, 1956, to file Form DD-A as prescribed under the rules before he is appointed or reappointed as a director of the company. The defendant club is a company and the office bearers and the members of the Executive Committees are in real sense directors of the company. None of the plaintiffs has filed such declaration form as reported by the auditor as on 31 March 2004. The eligibility or other qualification for the election has to be determined as on the last date of nominations, i.e., 26 November 2004, as it is the cut off date for determination of valid nominations u/s 274(1)(g) of the Companies Act, 1956 read with the said Rules. Those members who have fulfilled above criteria are only eligible to offer themselves for reappointment as directors. Hence, their nominations were clearly invalid and the plaintiffs/petitioners having failed to comply with the statutory mandatory Rules are disqualified themselves for reappointment as directors.

9. As regard the publication of list of valid nomination on the notice board on 26

November 2004 is concerned, he submits that this list was published inadvertently. No vested right has accrued to the plaintiffs/petitioners by reason of this publication of list inasmuch as there cannot be any estoppel against the statute. So the plaintiffs cannot take advantage of the legal wrong. The majority of the plaintiffs/petitioners in particular, the plaintiffs/petitioner Nos. 1, 2, 3, 4, 9 and 10 are directors in other several public/private limited companies, and as such, it is expected of them to have knowledge of requirements of various important provisions of Companies Act, 1956. Most of the plaintiffs/petitioners have been serving in the Executive Committee of the club for last several years. So, it is expected that each of them is aware of the need of compliance of various provisions of the Companies Act, 1956 including Section 274(1)(g) thereof. When the plaintiffs/petitioners failed to give their declarations u/s 274(1)(g) of the Companies Act, 1956, they forfeited their right for nomination for reappointment as directors and/or to continue any further. Lastly, he argued that this application and the suit filed by the plaintiffs/petitioners are mala fide as they have not made eight candidates, viz., Sri Hari Prasad Kanoria, Sri Vinit Mehta, Sri Vijay Kumar Chandak, Sri Mahabir Prasad Saraf, Sri Radheshyam Banka, Sri Radheshyam Tulsian, Sri Subir Poddar and Sri Suryakant M. Damani parties to the suit, although they had filed declaration and had qualified to be valid candidates.

10. Mr. Sen submits that, apart from deciding the issue raised in the application, for future guidance, this court should give a declaration and/or opinion as to whether the plaintiffs/petitioners are entitled to be nominated as elected Executive Committee members of the club in view of the violation/non-compliance of Section 274(1)(g) of the Companies Act, 1956 read with Rule 9 of the Companies (Disqualifications of Directors u/s 274(1)(g) of the Companies Act, 1956) Rules, 2003 on/or before the cut-off date for filing nominations dated 26 November 2004.

11. Mr. Debal Banerjee, learned senior counsel appearing for the defendant No. 4, Mr. Bijoy Bumar Sharma, being the auditor contends that the allegation made against this defendant by the plaintiffs is not only baseless and unjust vilification but the same is also unfortunate as this defendant for a long time while working as auditor in various organizations has acquired a great reputation. As a professional man, his client has bona fide made audit under the provision of Section 227 of the Companies Act, 1956. He is obliged to submit a report faithfully amongst others whether any of the directors has been qualified under Clause (g) of Sub-section (1) of Section 274 of the said Act or not. He submitted the audit report and this was placed in the 19th meeting of the Executive Committee for the year, 2003-04 on 9 November 2004 in which the plaintiff No. 1 amongst others was a participant. In this meeting, all the members of the Executive Committee duly accepted correctness of the report filed by this defendant. Upon scrutiny, this defendant found that there has been no filing of the statutory declaration in a prescribed form by the plaintiffs or any of them as on 31 March 2004; so, under the statute, he is duty bound to report and inform

the members of the company. If he does not do so, then as a professional man he would be committing legal misconduct. Therefore, his client is entitled to be compensated for the damages done to his reputation and mind. Therefore, complaint against him shall be expunged and this petition shall be dismissed as against his client.

12. Mr. Bhaskar Sen, learned senior counsel appearing on behalf of the some of the candidates, who have filed nominations have made application for addition of party. Such application should be dealt with before the application is heard out and judgment is rendered for his clients" interests are also seriously affected by the decision of the club authority cancelling the nominations. He claims that his clients duly filed the nominations along with the declaration in the statutory form. Therefore, there was no justification going by the club"s policy and rules to cancel the nomination of his clients. He, therefore, submits that the club authority should be directed to proceed with the election immediately.

13. I have heard the learned counsel for the parties and I have gone through the petitions and other materials placed before me. In this interlocutory application, the first point has been taken regarding jurisdiction of this court. I have examined the copy of the plaint filed in the suit. It appears that the suit has been filed on obtaining the leave under Clause 12 of the letters patent. No application has been made for revocation of leave under Clause 12 on the letters patent. However, it cannot be the law law unless such application is made, the court will not examine the question of jurisdiction, rather it is the duty of the court to examine at the threshold, if such plea has been raised by the contesting party. But at this stage, this plea is to be examined only looking at the plaint unless the defendant, raising question of jurisdiction, has supplied an unimpeachable document and materials for rendering a decision on this issue.

14. Here, Mr. Sen merely raises the point that no part of the cause of action has arisen within the territorial jurisdiction of this court, even going by the disclosure of the jurisdictional fact in the plaint. I have seen the plaint. The plaintiff has pleaded in paragraph 5 that the Auditors" report to the members included in such annual general report is made over to the company on/or about 9 November 2004. Such Auditors" report is stated to have been prepared at 6, Old Post Office Street, Calcutta-700001 within the aforesaid jurisdiction. In the suit, the plaintiffs have claimed declaration that they are eligible for contesting the election for the post of Executive Committee members of the company at the annual general meeting of the company. According to the plaintiffs, their rights have been affected because of the auditors" report prepared and furnished and the same was done at 6, Old Post Office Street, Calcutta within the aforesaid jurisdiction. So, in my view, the part of cause of action is certainly related to furnishing of the report by the auditors and the remaining part of the cause of action is related to the decision of the club authority whereby the plaintiffs" rights were denied. Therefore, if this bundle of facts constituting the cause of action are deeply considered, then I think the aforesaid publication of report by

the auditor is certainly one part of the cause of action.

15. I, therefore, hold that this court has jurisdiction to entertain, try and determine the suit as leave under Clause 12 of the letters patent having been granted and so long such leave is not revoked subsequently by the court, jurisdiction to try this suit remains with the court.

16. On merit, the points involved in this matter are that, firstly, whether the Election Officers going by the provisions of the election rules have lawfully cancelled all the nominations or not; secondly, whether non-filing of the statutory declaration in the Form DD-A in terms of Rule 9 renders the members of the club ineligible to contest the election for formation of the Executive Committee or not; thirdly, whether the report furnished by the auditors subsequently by way of erratum is correct or acceptable on the facts and circumstances of this case.

17. Mr. Mukherjee contends that in the election rule, nowhere it is provided that a candidate has to file a declaration in the prescribed form to contest the election by filing nomination. I think in this context, it is necessary to set out the relevant portion of the rules for election of the office bearers and members of the Executive Committee of the club:

"2 A permanent member who has paid his or her dues to the club for bills sent to him/her prior to the date of circular inviting nomination will, only be entitled to propose or second or to offer himself or herself as a candidate. All such payments should be made before exercising such rights.

3. A permanent member may send one or more nominations but the same candidate cannot stand for more than one post of the office bearers or Executive Committee member.

5. (a) Scrutiny of proposals : The Election Officer shall scrutinise the nominations received as a list of valid nominations will be displayed on the notice board of the club, at least before two weeks of the date of annual general meeting;

(b) If the number of the candidates for the office bearers and the members of the Executive Committees is equal to the office bearers and members to be elected, the ballot papers will not be issued and those candidates would be considered having duly been elected;

(c) If the number of candidates for the post of any office bearer and/or members of the Executive Committees exceed the number of the elected members, then election shall be held by ballot only for such post for which the numbers so exceed."

18. From careful examination of the aforesaid rules, it appears to me, as right submitted by Mr. Mukherjee, that in order to hold the nomination papers filed by the members being valid, the filing of the declaration in the prescribed Form DD-A under the Companies Act, read with rules, is not required. These rules were framed when the provision of the aforesaid Companies Act, and rules above were

not in existence. According to me, validity of a nomination has to be adjudged in the context and in reference to the Rules 2 and 3. The rule prescribes the eligibility criteria for filing nomination. A member who has paid his or her dues to be club for the bills sent to him or her prior to the date of circular inviting nominations is treated to be eligible to file and in case of default, the nominations should be held to be invalid. Another aspect is that a member cannot file any nomination intending to stand for more than one post of the office bearers of Executive Committee member.

19. At the time of filing of the nominations only the aforesaid conditions are required to be examined by the Election Officers and/or club authority and no other thing is required to be looked into.

20. Unlike the appointment and re-appointment of the directors in the limited company under the companies laws, here, the appointment is not made under the provisions of the Companies Act. It is done by the election. If a particular candidate is not elected by the members, question of the appointment or re-appointment does not and cannot arise if such appointment is to be made within Clause (c) of Rule 5. However, in the event the members or the office bearers are deemed to have been elected by virtue of the provision of Rule 5(b)--then on the date of filing of nomination such declaration form may be necessary.

21. It appears to me from the records that the number of candidates who filed nominations far exceeds the number of the members of the Executive Committee and the office bearers. Therefore, election was and still is required to be held.

22. Accordingly, I hold that the decision of the club for cancellation of the nomination on the ground of non-filing of the statutory declaration in the prescribed Form is not in accordance with the rules of the club. There was no warrant to declare the same being invalid on that ground.

23. Now the question comes whether the Declaration Form under the provisions of Rules 9 read with the said Act is required to be filed or not. Admittedly, this club is in real sense a limited company and admittedly, as it appears that there are members who are also the directors of other public limited companies. Therefore, at the time of the appointment or re-appointment whether by election or otherwise of the members of the Executive Committee or the office bearers, filing of the declaration in the prescribed form is a must. The language of Section 274, Sub-section (1), read with the rules in this regard, are mandatory and one cannot escape from these provisions. Accordingly, I hold agreeing with the argument of Mr. Sen that any of the members who is appointed by an election of this club immediately after being elected shall file the aforesaid declaration. It is not necessary that at the time of filing of nomination, such declaration is required to be furnished but this must be done immediately after having been elected, in default, his election will be illegal and he cannot be appointed under the law.

24. Now coming to the question of the correctness of the Auditors' report I am

of the view that it is the duty of the auditors to submit a report amongst others about disqualification of any of the directors or members under the provision of Section 227, Sub-section (3), Clause (f).

25. As rightly argued by Mr. Banerjee, it is statutory duty of the auditor to submit such report. The auditor being the chartered accountant cannot ignore the aforesaid mandatory provision of law.

26. In this case, I find the auditor has submitted the report by way of correction subsequently. It seems to me that he has submitted report on the basis of the statement and information supplied by the Secretary of the club. From the careful perusal of Section 227 of the said Act which provides the power and duties of the auditors, it appears to me that the auditor cannot submit a report on the basis of the statement supplied by the company alone. He has to examine and even he has to make an independent enquiry about the collected materials from other sources to submit a report regarding Clause (f) of Sub-section (3) about the disqualification of the directors u/s 274(1) Clause (g). In my view, one cannot conclusively come to a decision of fact finding that in view of non-filing of declaration prescribed in the statutory Form by any of the directors seeking appointment and reappointment, the said director is automatically disqualified. Section 274 provides the grounds when a director can be said to be disqualified. Before a person is declared to be a disqualified by auditor or any other person--it [a view?] has to be formed whether the grounds mentioned in Section 274 have been proved without any doubt. Naturally, the auditor concerned has to collect materials. In this case I do not find any such materials having been collected. Moreover, I think, before reporting a particular person being disqualified--an auditor must seek for the views and/or representation of the director concerned or any of the persons as to whether he was a director of the defaulting company as mentioned in Section 274. In my considered opinion. Auditor's reports really affect a particular person's right as his civil right or status is necessarily declared in a negative way by the auditor by its fact finding. The rules of natural justice demand that before a person's right is affected he/she should be given to explain his or her position.

27. In this case, I find the auditor initially has not followed the aforesaid procedure. However, at the same time, I observe this procedure is nowhere provided in the Act or Rules. He has proceeded bona fide and according to his own interpretation and judgment I cannot hold that the auditor has done any mala fide act in this matter. It appears that Mr. Mukherjee's client has already filed the declaration in the prescribed statutory form after the cut off date but long before election.

28. Under such circumstances, I am of the prima facie view that decisions of the club authority cancelling the nomination and deferring the annual general meeting as well as the election is not valid and not in consonance with the club rules. Therefore, I direct the club authority to proceed with the holding of annual general meeting and election on the basis of the nominations, which have already

been filed. However, immediately after election, it has to be ascertained whether the declaration in the prescribed statutory Forms have been furnished by the elected candidates or not. It will be open for the club to update the election rule in consonance with the company laws and Rules framed thereunder.

29. In order to ensure fair and free election before holding annual general meeting, I appoint Mr. Samit Pani Brahmachari, Advocate, IB, Old Post Office Street, Calcutta, as a Special Officer who is to supervise the election and will see the annual general meeting and elections are held in accordance with the club rules and observation made by me. After election and annual general meeting are held--the Special Officer shall stand discharged. He shall be paid initial remuneration of 600 GMs. by the defendant club. He shall submit a report of compliance of the aforesaid orders to this court.

30. Cost, costs in the cause.