(1956) 08 MAD CK 0024

In the Madras High Court

Case No : Criminal Appeal No''s. 307 to 309 of 1956

Public Prosecutor APPELLANT

Vs

T.P. Khaitan and Others RESPONDENT

Date of Decision : 22-08-1956

Acts Referred:

Companies (Amendment) Act, 1956 — Section 299, 300
Companies Act, 1913 — Section 91A, 91A(2), 91B, 91B(1), 91B(2)

Citation : AIR 1957 Mad 4 : (1957) CriLJ 69 : (1957) ILR (Mad) 665

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Single Bench

Advocate : Advocate General for Public Prosecutor, for the Appellant;

Final Decision : Dismissed

Judgement

Rajagopala Ayyangar, J.—These three appeals by the Public Prosecutor raise for consideration the proper interpretation of Section 91(B)

(1), Indian Companies Act. The Magistrate before whom the accused in the several appeals were charged has held that there was no

contravention of the provisions of this section and has by his judgment dated 30-1-1956 acquitted the accused. It is from this order of acquittal

that these appeals have been preferred.

The learned Advocate-General appearing for the appellant urged that he desired to have a considered decision on the construction of the provision

I have mentioned above, but as I was clearly of the opinion that the decision of learned Magistrate was correct, I did not think it necessary to issue

notice to the accused u/s 422, Criminal P. C.

2. The facts which have given rise to these proceedings are as follows : Messrs. Oakley Bowden and Co. (Madras) Ltd., is a public company

registered under the Indian Companies Act. It is managed by a Board of three directors and under the Articles of the company the Board acts

either at meetings or by resolutions passed by circulation.

3. On 2-6-1953 the Board of Directors which then consisted of T. P. Khaitan. V. S. Krishnaswami and V. S. Bhasin passed by circulation the

following resolution :

Resolved that the Chartered Bank of India, Australia and China, Madras, the Imperial Bank of India, Madras, the National Bank of India Ltd.,

Madras, the Indian Bank Ltd., Madras and the Eastern Bank Ltd., Madras and Bombay, be and are hereby empowered, whether the company''s

account is in credit or overdrawn, to honour cheques, bills of exchange, and promissory notes, drawn, accepted or made on behalf of the

company, by any one of the two gentlemen :

1. Sri T. P. Khaitan

2. Sri V. S. Krishnaswami

and act on any instructions and accept any receipts or other documents relating to the account transactions or affairs, of the company, if so signed

on behalf of the company.

All the three directors including the two named in the resolution signed in the minutes in token of the resolution being passed. On 22-2-1954, this

resolution dated 2-6-1953 was cancelled and instead of the two directors named in the earlier resolution, one A. M. Khaitan, who was appointed

to act on behalf of the company and on behalf of its managing agents, and was directed to operate on these accounts.

By another resolution passed by circulation on 22-2-1954 V. S. Krishnaswami was instructed to communicate A. M. Khaitan''s appointment to

the respective banks. I need only mention that the resolution of 22-2-1954 which was also passed by circulation was signed by T, P. Khaitan and

V. S. Krishnaswami.

4. The Registrar of Joint stock companies filed the prosecutions C. C. Nos. 11913 to 11915 of 1955 complaining that the resolution dated 2-6-

1953 and the two resolutions dated 22-2-1954 were in contravention of Section 91(B)(1), Indian Companies Act, bringing the concerned

directors, T. P. Khaitan and and V. S. Krishnaswami within the mischief of Section

91B(2).

The resolution dated 2-6-1953 was the subject of complaint in C. O. No. 11913 of 1955 from which Cri. Ap. No. 307 of 1956 has been filed,

while the resolution dated 22-2-1954 cancelling the resolution dated 2-6-1953 formed the basis of the complaint in C. C. No. 11914 from, which

the Cri. Ap. No. 308 of 1956 arises and the resolution authorising V. S. Krishnaswami to communicate the resolution dated 22-2-1954 to the

banks was the subject of complaint in C. C. No. 11915 of 1955 which has led to Cri. Ap. NO. 309 of 1956.

T. P. Khaitan and Krishnaswami are the accused in C. C. Nos. 11913 and 11915 of 1955 while V. S. Krishnaswami who was instructed to

communicate the resolution dated 22-2-1954 to the banks is the sole accused in C. C. No. 11914 of 1955.

5. Section 91B which is said to have been contravened by the accused in the present case runs :

91-B(1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested

nor shall his presence count for the purpose of forming a quorum at the time of any such vote; and if he does so vote, his vote shall not be counted:

Provided that the Directors or any of them may vote on any contract of indemnity against any loss which they or anyone or more of them may

suffer by reason of becoming or being sureties or surety for the money.

(2) Every director who contravenes the provisions of Sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) This section shall not apply to a private company : Provided that where a private company is a subsidiary company of a public company, this

section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.

6. The basis of the prosecution was that the accused as directors voted on a contract or arrangement in which he or they was or were either

directly or indirectly concerned or interested and that they had thereby contravened the provisions of Sub-section (1) so as to bring them within the

penal consequence enacted by Sub-section (2).

Before dealing with the meaning of the expression ""contract or arrangement in which he is either directly or indirectly concerned or interested"" in

Sub-section (1), it might be useful to refer to the term of Section 91-A, which also refers to ""an interest on the part of the directors in a contract or

arrangement with the company"" :

Section 91-A(1) : Every director who is directly or indirectly concerned or interested in any con-tract or arrangement entered into by or on behalf

of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his

interest then exists or in any other case at the first meeting of the directors after the acquisition of his Interest or the making of the contract or

arrangement.

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm and is to be

regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure with

the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction

with such firm or company.

(2) Every director who contravenes the provisions of Sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which Sub-section (1) applies,

and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of Sub-section (3) shall be liable to a fine not

exceeding five hundred rupees.

It must be clear from the collocation of the two sections that the contract or arrangement dealt with in the two provisions must be Identical. While

Section 91-A enjoins an obligation on the director who is interested in a contract or arrangement entered into by the company to disclose his

interest to the other directors and imposes penalties for not disclosing his Interests. Section 91-B is designed to prevent such interested director

from voting on these resolutions.

7. Thus the nature of the contract or arrangement as well as the nature of the concern or interest of the director dealt with in Section 91-B must

both be obviously of the same nature as that envisaged by the identical words in Section 91-A. So far as the latter section is concerned, it does not

need much argument to establish that it is designed to ensure that a director who is in a fiduciary position to the company does not make any secret

profit on account of the transactions or business of the company while acting on its behalf. As was stated in North West Transportation Co. v.

Beatty (1887) 12 AC 589 ,

a director is precluded from dealing on behalf of the company with himself entering into engagements in which he has a personal interest conflicting

or which possibly makes conflicts with the interests of those whom he is bound by fiduciary duties to protect and this rule is as applicable to the

case of one of several directors as to a managing or a sole director.

The object of the statutory provision in Section 91-A was to secure that there shall be no conflict between the personal interest of each of the

directors and their duty towards the company without the nature of that interest being disclosed to the directors and the shareholders. When there

is a possibility of such a conflict, by a director having personal interest in any contract or arrangement entered into by the company, Section 91-A

provides for its disclosure to the other directors so that the company would have the advantage of the unbiased and informed judgments of the

other directors as to whether in the interests of the company such a transaction need be entered into or not.

Sub-section (3) of Section 91-A, which was introduced by the Companies Amendment Act, 1936, makes provision for this information becoming

available to shareholders by requiring this matter to be entered in a register, so that even they might be kept informed of the personal interest of the

directors in any contract entered into on behalf of the company.

Thus the general rule of law that directors shall not make a profit out of the contracts by the company without the knowledge of the co-directors

and the shareholders is statutorily enforced and if there is a violation besides the common law obligation to account to the company for these

profits, there is a penalty superimposed by Section 91-A(2).

8. In the case of the resolutions now said to be contraventions of Section 91-B(1) it is not the case of the prosecution that these resolutions

involved any contract in which the accused-directors were directly or indirectly concerned or interested but their case was that they involved an

arrangement in which there was such concern or interest. I am clearly of the opinion that the prosecution was misconceived and that the resolutions

do not fall u/s 91-B(1) at all but are merely acts of delegation in the normal course of the management of the company.

9. The main provisions of Sections 91-A and 91-B which were introduced by an Amending Act, 11 of 1914 have had a previous history. By

Section 29 of the Companies Clauses Act 7 and 8 Vict. Ch. 110, directors of the companies included in that enactment were precluded from

voting or acting as directors on the subject of any contract proposed to be made by or on behalf of the company in which they were interested and

any contract with certain exceptions in which any director was interested was of no effect until confirmed by the shareholders at the next or general

meeting.

The decisions rendered on Section 29, Companies Clauses Act, 1845 are collected by Lindley in his treatise on ""Companies"", 6th Edn. Vol. I, at

page 450, note-Y. An examination of these would show that the arrangement hit at by the provision was one in which the director had a personal

interest conflicting with his duties towards the company and not one which merely provided for his management of the company.

10. There was no statutory provision corresponding to this Section 29 in the English Companies Act of 1862. In equity, however, the same

principle namely that a transaction in which a director purporting to act on behalf of the company has in fact been dealing with himself as an

individual could not stand if his interest conflicted with that of the company applied to the cases of companies incorporated under the English

Companies Act, 1862,

The same principle was, however, not recognised at law. But this ceased to be of any consequence after the Judicature Act 1875. The principle of

this statutory provision was, though somewhat inadequately, sought to be achieved by provisions in the articles of the several of the companies

registered under the earlier English Companies Acts; particularly as the rules of the Stock Exchange, London, required that in the case of a

company requiring a quotation, the articles must provide that a director shall not vote on any contract in which he is interested and that if he does so, his vote shall not be counted. In the English Companies Act, 1948, Section 199, which re-enacted S. 149 Companies Act, 1929, provides :

It shall be the duty of a director of a company who is in any way directly or indirectly interested in a contract or a proposed contract with the

company to declare the nature of his interest at a meeting of the directors of the company,

and the directors who failed to comply with the provisions of the section were made liable to fine of not exceeding ï¿½100. In line with this Article

84 of Table A provides :

A director who is in any way directly of indirectly interested in a contract or a proposed contract to the company shall declare the nature of his

interest at a meeting of the directors in accordance with Section 199.

(2) A director shall not vote in respect of any contract or arrangement in which he is interested and if he shall do so, his vote shall not be counted;

nor shall he be counted in the quorum present at the meeting but neither of these prohibitions shall apply to (then follows the description of the

arrangements not relevant to the present context).

11. These provisions have to be read in the light of the fundamental principle of company law that the directors are the body entrusted with the task

of carrying on the business of the company. This is provided for by Article 71, Indian Companies Act, which is deemed to be the part of the article

of every company u/s 17(2) of the Act.

Though the directors as a body are responsible to the shareholders for the conduct of the company''s business, it is undoubted law that, they could

delegate their powers to one or more of themselves for the purpose of carrying it on more conveniently.

Thus in the present case if the resolutions which are now charged as offences were not passed, the result would only be that the bank account

would have to be opened in the names of all the directors and to be operated by all of them. If this had been done by a resolution it could not be

said that by opening the account in the bank in their names the directors had violated either Section 91-A or Section 91-B, for if this constituted a

violation of Section 91-A or Section 91-B, it would be apparent that the company cannot open a banking account at all, which would show the

absurdity of that position.

If a resolution of the Board of directors authorising that body to open a banking account and each one of the directors to operate on the account

so opened is not a contravention of Section 91-A or Section 91-B, it will be so because the directors are not personally interested in the

management as distinct from their interest in it as directors of the company. If the interests of the directors as such were to be hit at by the sections,

the management of companies by the Board of Directors would become impossible and the work of every company would be at a stand-still.

If it is borne in mind that the purpose of the sections is the avoidance of conflicts between duty and interest it would be apparent that the carrying

on of the business of the company for which the directors are appointed cannot give rise to that conflict. Peterson J. had to consider a similar

question in Foster v. Foster, 1916 1 Ch 532 (B).

Article 93 of a company provided that a director might contract with the company but prohibited a director from voting in respect of any contract

in which he was interested and under Article 99 the directors ""may from time to time appoint any one or more of their body to be managing

director or directors, for such period, at such remuneration, and upon such terms as the directors think fit.

One Mrs. Foster who was one of the Board of Directors was appointed as chairman and joint managing director of the company without

remuneration. The resolution appointing her to this office was passed at a meeting of the board at which she was present and in which she voted

and the validity of those appointments was challenged on the ground of contravention of Article 93. Peterson J. rejected this contention by saying:

.....the appointment by the Directors of one of their body as chairman, or the appointment by the directors of one of their number as a managing

director, without more, is not a contract within Article 93, but is merely a delegation of their powers and is very similar to the power which they

possess to appoint committees of themselves and delegate their powers to those committees. In my judgment, therefore, the appointments in

question were not contracts within Article 93, and therefore Mrs. Foster was not disabled from voting in support of the resolution.

12. Illustrations of a similar construction of statutes designed for like purpose as Sections 91-A and 91-B, Indian Companies Act are numerous

and I would refer only to two of them.

Nutton v. Wilson, (1889) 22 QBD 744 was concerned with the construction of Rule 64, Schedule II, Public Health Act 1875, which provided

that a member of a local board who was in any manner concerned in any bargain or contract entered into by such board shall cease to be such

member and his office as such shall thereupon become vacant and Rule 70 imposed a penalty on a person ""who acts as such member when

disabled from acting by any provision of the Act"".

A.L. Smith J. imposed on a defendant who was a member of a local board penalties under Rule 70 for being concerned in a contract with another

person whose contract with the Board had been accepted on a resolution moved by the defendant. The Court of appeal dismissed the defendant''s

appeal and Lindley L.J. after pointing out that the expression ""in any manner concerned"" was of fairly wide import said :

To interpret words of this kind, which have no very definite meaning and which perhaps were purposely employed for that very reason, we must

look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise.

Lopes J. said :

It seems to me that if we held the contrary, it would be letting in the very mischief which the Act intended to prevent, and subjecting the members

of local boards to the class of temptations which it was intended to remove.

13. Barnacle v. Clark, 1900 1 QB 279 arose u/s 34. Elementary Education Act, 1870, which provided that a member of a school board who

shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board

was liable to a penalty and his office became vacant.

The respondent, a member of a school board, sold sand and gravel to a builder who had entered into a contract with the board for the building of

a school knowing at the time of his sale that these materials were intended to be used in the building of the school. Ridley and Darling JJ. held that

the respondent had contravened the provisions. The learned Judges referred to (1889) 22 QBD 744 and stated that these provisions were

intended to ensure that members of public bodies shall be free from any suspicion of deriving profit, directly or indirectly, by reason of the position they hold.

14. If this was the object of the enactment, it follows that the mere carrying out the duties of a director would not amount to ""being concerned to

any contract or arrangement"" within Section 91-A or Section 91-B, Indian Companies Act. In this connection I will only repeat that the expression

interest in an arrangement"", though somewhat elastic, must in the context receive the interpretation that it must be of such a nature as to involve a

conflict between interest and duty of the same type as would arise in the case of personal interest In The contracts of the company.

In both these situations, what is aimed at is the avoidance of a director who has a personal Interest in a transaction of the company from getting the

board of directors to agree to it without informing the co-directors of his interest and by taking part in the voting.

15. It is this conflict between the personal or self-interest of the director and his duty to the company to render independent and unbiased advice,

that is the mischief, which these provisions are intended to remedy. Viewed thus; it would be clear that in the present case the resolutions of the

Board constitute but a delegation of the power of the board to certain of their members and there Is no element of personal interest involved in it

so as to give room for any conflict between interest and duty; and therefore no violation of Section 91-B.

16. The order of the Magistrate acquitting the accused in these three prosecutions are therefore correct and the appeals are rejected u/s 421,

Criminal P. C.

