

(2011) 08 DEL CK 0499

In the Delhi High Court

Case No : IA No. 11428 of 2011 in CS (OS) No. 1752 of 2011

Rakesh Saraf and Others

APPELLANT

Vs

Chelmsford Club Limited

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Companies Act, 1956 — Section 192A

Citation : (2011) 08 DEL CK 0499

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Prabhjit Jauhar, Hemant Palpher and Balbir Singh Nayyar, for the Appellant; Neeraj Kishan Kaul Pawan Sharma and Sharan Chadha, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—The three Plaintiffs namely Sh. Rakesh Saraf, Sh. Harjeet Singh Kakkar and Sh. R.K. Narang (hereinafter to be referred as "third set of members") have filed the present suit for declaration mandatory and permanent injunction against the Defendant i.e. Chelmsford Club Limited inter alia to pass a decree of declaration that Clause 39 (c) to 39 (j) of the Memorandum and Articles of Association of the Defendant-club along with Article 46 (v) are null and void and contrary to the mandate of the Companies Act, 1956 and, therefore, are liable to be declared ultra vires the companies Act, 1956 and the elections to the post of President and members of the Managing Committee of the Defendant club are liable to be held by a secret ballot/voting machine for conducting fair and transparent elections by appointing an independent Chairman assisted by two or more persons and further to restrain the Defendant from holding the elections/AGM of the Defendant club on the basis of ballot papers to be issued through postal certificate.

2. Along with the suit, the Plaintiffs have also filed the application being I.A. No. 11428/2011 under Order 39 Rules 1 and 2 seeking interim order inter alia

restraining the Defendant club, their office bearers, representatives etc. from in any manner, holding the elections/AGM of the Defendant club on the basis of ballot papers to be issued through postal certificate and restrain them to verify/certify the balance sheet of the Defendant club for the year ending 31.03.2011.

3. Admittedly, prior to filing of the present suit, in the two earlier suits being CS(OS) 1805/2010 and CS(OS) 1861/2010 filed by Mr. Jagtaran Singh Anand and Ors. (hereinafter to be referred as "first set of members") wherein the issue involved was with regard to the rejection of nomination of the candidates on the ground of not furnishing their consent to contest elections in person and also in furnishing their consent late by one day. The elections were held on 15.09.2010 vide order dated 13.09.2010. An order was passed by another Bench of this Court that the declaration of result will be subject to the outcome of the final outcome of the final judgment.

4. Vide judgment dated 17.01.2011, it was held that Article 39 (a) requires the nomination of the candidate at the time of filling of the nomination form was ultra vires and the club was not permitted to resume the election process started on 18.08.2010 and the club should start a fresh election process.

5. The other set of members Joginder Singh Kohli and Ors. (hereinafter to be referred as "second set of members") filed a fresh suit in the month of February, 2011 before this Court being CS(OS) 397/2011 who had inter alia challenged the Circular dated 01.02.2011 issued by the club prescribing the procedure for election to the Managing Committee of the Chelmsford Club. The said suit and interim application were disposed of in view of the statement made by the counsel appearing on behalf of the club. The relevant extract of the orders are reproduced below:

4. According to the Defendant - club, the circular dated 1st February, 2011 is issued by the Chelmsford Club to complete the election process started on 13th August, 2010. However, the election process could not be completed in view of two suits bearing CS(OS) No. 1805/2010 and CS(OS) No. 1861/2010 filed by some of the members challenging the election. Both suits have been decided vide judgment dated 17th January, 2011 and the Club is now proceeding to complete the election process in terms of the said judgment. 5. According to the Plaintiffs, the judgment dated 17th January, 2011 does not permit the Club to resume the election process started on 13th August, 2010 and the Club should start a fresh election process. Mr. P.V. Kapur, Senior Counsel along with Mr. Pawan Sharma, Advocate is present in Court on behalf of the Club and he submits that the Club is holding the election process in terms of the judgment. 7. Mr. P.V. Kapur, learned Senior Counsel for the Defendants on instructions from Mr. Pawan Sharma and the Secretary of the Club submits that without prejudice to the rights and contentions of the club and in deference to the suggestion of this Court, Defendant No. 1 shall apply for clarification of the judgment dated 17th January, 2011 within two weeks and shall keep the election process in abeyance till the clarification is made. 8. In that view of the matter, the Plaintiff's

grievance is redressed. The Plaintiff's suit is disposed of in view of the statement made by Defendant No. 1. However, the Plaintiff shall be at liberty to take fresh action if any grievance survived after the clarification.

6. Subsequently, the Defendant/club pursuant to the final judgment dated 17.01.2011 passed in CS(OS) 1805/2010 moved an application being I.A. No. 5050/2011 for clarification as to whether the final judgment dated 17.01.2011 required the Defendant to resume the election process initiated on 13.08.2011 by allowing only 38 candidates to contest the election. The application was decided vide order dated 27.05.2011 by the same bench who passed the judgment dated 17.01.2011 in the presence of first set of members and Defendant/club. The relevant part of the order reads as under:

After some hearing, learned Counsel agreed as follows:

1. That the elections for the two years in question i.e. 2010-2011 and 2011-2012 would be held on 18.08.2011 at the Defendant club after duly notifying all members in accordance with its Memorandum and Articles of Association.
2. The ballot papers shall not describe any member or members as part of the existing Managing Committee except as prescribed by the Memorandum and Articles of Association.
3. The ballot papers would be dispatched to the members by speed post to ensure the widest participation in the elections.

It is open to such of the parties who are aggrieved by any action or cause that may arise in future in connection with the proposed election to institute or avail of such remedies as are permissible in accordance with law.

7. In the present suit the third set of members assail Clause 39 (c) to 39 (j) of the Memorandum and Articles of Association of the Defendant's club wherein the same postulates holding of elections of the Managing Committee through postal ballots which are to be circulated through postal service. The learned Counsel for the Plaintiff submits that the controversy in the present case and earlier suits is distinct and separate therefore, the present suit is not barred by the principles of res judicata.

8. He further submits that the Plaintiffs in the present suit are not the same members and were not the parties to the earlier suit. Therefore, they are entitled to challenge the provisions of Articles 39 (c) to 39 (j) and request the court to restrain the Club to hold the elections to be held on 18.08.2011 through postal ballots of certain members which are to be circulated through postal service.

9. The interim application filed by the Plaintiff is strongly opposed by Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the Defendant inter alia on the ground that the Plaintiffs have not approached this Court with clean hands as they have suppressed material facts from this Court. The contention of the learned Senior Counsel is that after passing the aforesaid order dated

27.05.2011, the first set of members through same counsel filed an application being I.A. No. 10552/2011 seeking modification/clarification of the order dated 27.05.2011 in CS(OS) No. 1805/2010 (who had earlier agreed to dispatch postal ballots by speed post as recorded in the said order) and had also challenged the same very provisions of Article 39 (c) to 39 (j) of the Articles of Association of the Defendant in the same application which was dismissed as withdrawn after hearing vide order date 08.07.2011.

The said fact has not been disclosed by the present Plaintiffs intentionally and deliberately in order to suppress the material facts. Therefore, the Plaintiffs are not entitled for the discretionary relief of interim injunction as the Plaintiffs were aware of earlier proceeding being the same counsel.

10. I have perused the application being I.A. No. 10552/2011 filed in CS(OS) No. 1805/2010 and the order passed on 08.07.2011 as well as the clarificatory order dated 27.05.2011. It is not disputed that after passing the final judgment dated 17.01.2011 the Defendant sought the clarification from the same court whereby the order dated 27.05.2011 was passed. The learned Counsel appearing on behalf of the Plaintiff has not denied the fact that an application being I.A. No. 10552/2011 for clarification and modification of the order dated 27.05.2011 was filed by him on behalf of the first set of members in Suit No. 1805/2010 and the order passed therein. He states that since the Plaintiffs in the present suit are not the same, therefore, it is not mandatory to disclose the same. He further submits that by order dated 27.05.2011 the liberty was granted to institute appropriate proceedings in accordance with law in case the members are aggrieved. Therefore, the Plaintiffs in the present case who are aggrieved parties are entitled to challenge the validity of Article 39 (c) to 39 (j) of the Articles of Association of the Defendant which are contrary to the express mandate of Section 192A of the Companies Act, 1956 which envisages passing of resolution by postal ballots and that too in the case of listed public companies. As the Defendant is a public company limited by guarantee and there is no specific provision in the Companies Act, 1956, thus, under these circumstances no benefit can be derived by the Defendant-club by postal ballots. As far as the merit of the case is concerned, he has referred the various decisions in support of his submissions by challenging the validity of the provisions of Article 39 (c) to 39 (j).

11. In the facts and circumstances of this situation, it is to be seen as to whether the Plaintiff is entitled to get any relief as prayed in the interim application.

12. It is not disputed by the parties that after passing the order dated 27.05.2011 the Plaintiffs in the said suit filed the application being I.A. No. 10552/2011 for clarification and modification in which the challenge of the provisions as mentioned is identical and after hearing the application was withdrawn by that set of members in the said case through the same counsel. The relevant paras of the said application are reproduced as under:

4. That, however, vide paragraph 3 of the said order, it was also stated that the ballot papers would be dispatched to the members by speed post to ensure widest participation in the elections. The Plaintiff submits that admittedly, the Defendant-club is not a listed company and is a company by guarantee as envisaged under the Companies Act. The procedure prescribed under the Companies Act for holding the elections at the AGM has deliberately been flouted by the Defendant club and the Articles of Association of the Defendant club providing for postal ballot are clearly ultra vires the Companies Act since the Companies Act only in respect of the listed companies provide for postal ballot for passing certain resolution for considering the business. The relevant provisions of Section 192A of the Companies Act is being reproduced hereinbelow for ready reference: 192A. Passing of resolutions by postal ballot.

(1) Notwithstanding anything contained in the foregoing provisions of this Act, a listed public company may, and in the case of resolutions relating to such business as the Central Government may by notification declare to be conducted only by postal ballot get any resolution passed by means of a postal ballot instead of transacting the business in general meeting of the company.

(2) Where a company decides to pass any resolution by resorting to postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefore, and requesting them to send their assent or dissent in writing on a postal ballot within a period of thirty days from the date of posting of the letter.

(3) The notice shall be sent by registered post acknowledgement due, or by any other method as may be prescribed by the Central Government in this behalf, and shall include with the notice, a postage pre-paid envelope for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period.

(4) If a resolution is assented to by a requisite majority of the shareholders by means of postal ballot it shall be deemed to have been passed at a general meeting convened in that behalf.

(5) If a shareholder sends under Sub-section (2) his assent or dissent in writing on a postal ballot and thereafter any person fraudulently defaces or destroys the ballot paper or declaration of identity of the shareholder, such person shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(6) If a default is made in complying with Sub-sections (1) to (4), the company and every officer of the company, who is in default shall be punishable with fine which may extend to fifty thousand rupees in respect of each such default.

Explanation - For the purpose of this section, "postal ballot" includes voting by electronic mode". From a bare reading and perusal of the aforesaid provisions of the Act, it is apparently clear that only a listed public company can avail of the

resolutions relating to its members in General Meeting to be passed by means of a postal ballot instead of transacting the business in the General Meeting of the Company. Admittedly, the Defendant club is not a listed public company and the Articles of Association of the Defendant club requiring the transaction of the business of the general meeting by postal ballot is thus totally contrary to the mandate of Section 192A of the Companies Act, 1956. The various articles of the Defendant-club such as Articles 39(c,d,f,h,i and k) all inter connected which envisage dispatch of the ballot papers through postal ballot certificate is totally contrary to the mandate of the Companies Act and the procedure is only to be followed in case of a listed company.

5. That since passing of a resolution through postal certificates is only permissible in case of a listed company, the Defendant club not being a listed company, cannot take recourse to holding election or dispatching ballot papers to its members through speed post and liberty ought to be granted to the Plaintiff or any other member to assail the procedure to be adopted by the Defendant club for dispatching the ballot papers through postal certificates or speed post as the said act of dispatching of ballot papers by the Defendant club through speed post/ postal certificates is totally contrary to the express mandate of the Companies Act.

6. That in view thereof, liberty be granted to the Plaintiff or any other members of Defendant club to challenge and assail the dispatch of the ballot papers by the Defendant club through postal certificates since the said procedure is totally barred by the express provisions of the Companies Act and para 3 of the order dated 27.05.2011 be not implied as a direction so as to confer a right on the club to dispatch the ballot papers of the proposed elections through postal certificates.

13. The order passed on 08.07.2011 in the said application also reads as under:

After some hearing, learned Counsel for the Plaintiffs sought liberty to withdraw the applications. I.A. Nos. 10552/2011 and 10553/2011 are accordingly dismissed as withdrawn.

14. It is apparent on the face of it that earlier first set of members had sought similar relief and not only that they had also challenged the same provisions in the application.

15. It is a matter of fact that the Plaintiffs in the present suit have not disclosed the factum of filing of the application as well as the passing of order dated 08.07.2011. It is also not denied that the first set of members in CS(OS) No. 1805/2010 had agreed that the ballot papers would be dispatched to the members by speed post to ensure the widest participation in election. The said agreement of the parties was recorded in the order dated 27.05.2011, though it was passed on the application filed by the Defendant for clarification. I do not agree with the submission of the Plaintiff that under Clause (iv) of the order dated 27.05.2011, liberty was granted to challenge the validity of dispatch of ballot papers by filing of fresh suit. If that is so, then why the first set of

members had later on filed the clarification of ballot papers and challenged the same provisions and after withdrawal of the same the said fact was not disclosed in the present plaint. I am sure that the Plaintiffs were aware of the earlier litigation and orders passed by the Court as their counsel was also the same counsel appearing on behalf of the first set of members.

16. I feel that once the same has happened, in a way the Plaintiffs are estopped from raising their grievance regarding the ballot paper to be dispatched to the members at least about election for two years in question i.e. 2010-11 and 2011-12 which are to be held on 18.08.2011.

17. Under these circumstances, the Plaintiff is not entitled to the discretionary relief of injunction as prayed for. The application is accordingly disposed of.

18. As far as the challenge to the provisions is concerned, the same would have to be adjudicated on merit in due course, either at the time of trial of this matter or on the next election to be held in due course in accordance with law.

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19. List on 18.10.2011.