
(1961) 01 BOM CK 0006

In the Bombay High Court

Case No : Appeal No. 30 of 1961 (with Civil Application No. 117 of 1961)

Ramchandiram Mirchandani

APPELLANT

Vs

India United Mills Ltd. and Others

RESPONDENT

Date of Decision : 30-01-1961

Acts Referred:

Companies Act, 1956 — Section 2(3), 2(30), 261(1)

Citation : AIR 1962 Bom 92 : (1961) 63 BOMLR 678 : (1962) ILR (Bom) 186

Hon'ble Judges : Patel, J

Bench : Single Bench

Advocate : S.V. Gupte and A.B. Diwan, instructed by Chimanlal Shah and Co., Attorneys, for the Appellant; M.P. Amin, F.S. Nariman, P.M. Amin, All instructed by Payne and Co., for the Respondent

Judgement

(3) The effects, good and bad, of the managing agency system have been well expressed by Mr. Justice Pratt in Parshuram Dataam Shamdasani v. Tata Industrial Bank Ltd., 55 MLJ 697 (Suit NO. 2643 of 1923 OCJ of this Court). He says:

"Under this system (managing agency) a firm of financiers engrafts itself into the vitals of a Company by making its employment one of the Articles of Association. It usurps the functions of management, which properly belongs to the Directors. It may be either a source of strength supplying the Company with finance; on the other hand it may be a parasite draining the Company of its lifeblood.. . . .".

During the latter part of the war and thereafter experience showed that in quite a good number of cases the latter applied and therefore the Legislature intervened and recast the entire Companies Act, providing for a large number of checks which prevented managing agents getting control of the Board of Directors and thereby enabling themselves to cover their own deeds and misdeeds. The objects of the provisions must be kept in view when interpreting the sections of the Act.

(6) Section 261(1) of the Companies Act, so far as is relevant may be reproduced as follows:- "(1) If a public companyhas a managing "agent". none of the following persons shall be appointed as a director of the Company.except by a special resolution passed by the company:-

(a) any person who is an officer or employee of, or who holds any office or place of profit under, the company or any subsidiary thereof:

Provided that nothing in this clause shall apply to the director of such company or subsidiary, or to the holder of any office or place of profit under such company or subsidiary which may be held by a director of the company by virtue of section 314:

(b) where any office or place of profit which would disqualify a person under clause (a) read with the proviso thereto, is held by any firm, any partner in, or employee of, the firm;

(c) x x x x: (d) where any such office or place of profit is held by a body corporate, any officer or employee of such body corporate;

(e) x x x x; (f) any associate, or officer or employee, of the managing agents.

It may be noted that the conditions for the application of clauses (a) to (g) are satisfied.

(7) Mr. Gupte argues that B. M. And Co., satisfies clauses (a) read with section 2(30) which defines the word "Officer". He then says that since defendant No. 2 is an officer or employee of B. M. And Co., he comes within clause (d). His alternative argument is that in any event since the Agarwals are the managing agents, under general law every one of the partners is a managing agent, and defendant No. 2 being both an associate as defined by section 2 (3)(d) and an officer or employee of B. M. And Co., clause (f) applies. Mr. Nariman on behalf of defendant No. 2 has challenged the very premise of Mr. Gupte by saying that though B. M. And Co., may satisfy the condition of being an officer, it is not yet a holder of any office or place of profit under the company. If that is so, he says, clause (d) of section 261(1) cannot apply. It is also argued both by Mr. Amin and by Mr. Nariman that since defendant No.2 is merely a holder of the power of attorney, he cannot be considered to be an officer or employee of B. M. And Co. Regarding the alternative argument of Mr. Gupte it is argued that it is impossible to regard each of the partners in the position of a managing agent in view of the particular scheme of the Act and therefore this clause is not applicable at all. These respective arguments must now be examined.

(8) Section 2(30) of the Indian Companies Act defines the word "officer" to include "managing agent". . . . ; where the managing agent. . . . is a firm, also includes "any partner in the firm". The rest of the section is not material for the purpose of this appeal. In view of this definition, B. M. And Co., must be regarded as an officer of the Mills.

(9) At this stage the argument of Mr. Nariman that though B. M. And Co., may be regarded as an "officer" for the purpose of subsection (1) clause (a), it cannot be regarded as holding any office or place of profit under the company for the purpose of subsection (1) clause (d), must be considered. He relies for this purpose on certain election cases decided by this Court and by the Supreme Court. The first case on which reliance is placed is the case of Dattatraya Motiram More Vs. State of Bombay, . The question arose with reference to Articles 16(1) (2)(3) of the Constitution of India wherein the following words occur "employment or appointment to any office under the State". It was held

"The expression "under the State" makes it clear that the person holding office to which article 16(1) applies is a person who stands to the State as a subordinate would to a higher officer, or, in other words, there must be a relationship of employer and employee between the person holding office and the "State", or at least there must be an element of subordination to the State in the office contemplated by article 16(1)."

The second case relied upon is Maulana Abdul Shakur Vs. Rikhab Chand and Another, , where Articles 102(1)(a) and 58(1) of the Constitution were construed. The words are "office of profit under the Government of India". In that case the election of a person in the service of a Committee of Madarsa Durga Khawaja Sahib Akbari was being challenged. It was held by the Supreme Court that such an appointment could not be regarded as an appointment under the Government observing that

"The power of Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding in office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor."

A similar test was also laid down in reference to Article 19(1)(a) of the Constitution in the case of Ramnarain Ramgopal Chamediya Vs. Ramchandra Jagoba Kadu, . In the same volume in reference to the same article the same question arose in the case of Deorao Laxman Anande Vs. Keshav Laxman Borkar, wherein the following tests were applied:

"(1) What authority has the power to make an appointment to the office concerned?

(2) What authority can take disciplinary action and remove or dismiss the holder of the office? And

(3) By whom and from what source is his remuneration paid?

Of these the first two are more important than the third one".

(10) Though managing agent has large rights under the agreement of agency, he

is yet subject to the supervision of the directors and under certain circumstances he can be removed by the company. He is as liable for breaches of duty as any other smaller officer in the company. It is difficult therefore to say that the managing agent cannot be regarded as an officer holding an office or place of profit under the company.

(11) A partner exercises all the powers of the firm qua the business of the company of which the firm is the managing agent. He is entitled to a part of the remuneration out of the total given to the firm. Moreover, he and the firm are liable for breaches of duty. The major tests therefore are satisfied in the present case. Under these circumstances it is clear that B. M. And Co., must be held to be an officer holding an office or place of profit under the company.

(12) It also appears to me that though generally the tests applied above are good tests for determining if a person holds office or place of profit under some one, we cannot necessarily be confined to those tests. Cases may differ and the court has to construe the provisions of a statute in their context and with due regard to the objects to be achieved and the mischief to be prevented. It is difficult to appreciate the argument that though B. M. And Co., may be an officer in view of the definition, still it cannot be said to hold an office or place of profit under the company. I may refer to *Corpus Juris Secundum*, Vol. 67 at p. 97 wherein the word "officer" has been dealt with. It is said:

"In general an officer is one who holds, or is an incumbent of, an office, or who performs the duties of an office, or is lawfully invested with an office. "Officer" is inseparably connected with "office"; "there can be no officer without an office".

Even if therefore the test ordinarily applied were not satisfied, I would have come to the conclusion that B. M. And Co., held an office or place of profit under the Company, it being an "officer".

(13) Coming then to the next question of the applicability of clause (d) of Section 261(1) of the Companies Act, the question is whether defendant No. 2 is an officer or employee of B. M. And Co. At this stage the terms of the power of attorney may be advantageously considered. At the outset it must be mentioned that he is the power of attorney holder not of the directors but of the company itself and that could only be provided the company passed resolution for the purpose. I may also mention that defendant No. 2 has been shy in the matter of producing the relevant documents in regard to his appointment. The recitals in the power of attorney, however, do show that it was at the desire of the company that the power was given to him along with one another. It says that the company

"nominates, constitutes and appoints the said two gentlemen jointly and/or severally to be its true and lawful attorneys for it in its name and on its behalf as one of the partners of the said firm of Agarwal and Co., for the purposes of exercising all powers and duties in connection with the said firm of Agarwal and Co., or in any name the same partnership may be carried on"

and to do the following acts etc. Thereafter it goes onto enumerate what these two attorneys could do on behalf of the company in the partnership firm of Agarwal and Co. There is no doubt, looking to the terms of the power of attorney, that large discretionary powers are given to the attorneys including the power to make decisions as and when required in the affairs of the business. The power, in effect, gives the sole management to defendant No. 2 and the other, of all the affairs of the company qua the firm and as such they would also have a large measure of management of the Mills is any other partner would have.

(14) The word "office" has no specific meaning. It is a word of very large import and has been interpreted differently in connection with different statutes in its context. A few of meanings as given in Webster's Dictionary are as follows:

"(1) that which a person does for, or with reference to, another or others; a service;

(2) that which one ought to do or must do.. . . . ;

(a) duty connected with an occupation, position etc.;

(b) position of trust or ministration.

(6) (a) A Special duty, trust, charge or position conferred by an exercise of Governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging In its fuller sense an office embraces the elements of tenure, duration, duties and emoluments but the element of emoluments is not essential to the existence of an office.

(B) In a wider sense, any position or place in the employment of the Government, esp. One of trust or authority; also, that of an employee of a corporation invested with a part of the executive authority;.. . . . "

In Corpus Juris Secundum, Vol 67 at p. 96 where several definitions have been given it is said:

"The term "office" has various meanings and has been defined as a duty or charge a place of trust, or a right to exercise a public or private employment and to take the fees and emoluments thereof. An office may exist although there is no incumbent thereof or emoluments attaching thereto. The term "office" is one which is employed to conferee various meanings, and no one definition thereof can be relied on for all purposes and occasions. When used in any proper sense, the term implies a duty or duties to be performed, and that it is generally agreed that a position is an office when the elements of trust, honour and compensation combine with definite duties and responsibilities."

and at p. 97 in connection with "officer" it is said:

"Although many definitions of "officer" have been attempted, the meaning

thereof varies with the connection in which the term is used, and the courts have questioned the possibility of framing a definition which will be general in its application and meet the requirements of all cases which may be presented. In general an officer is one who holds, or is an incumbent of, an office or who performs the duties of an office, or is lawfully invested with an office."

By these tests defendant No. 2 must clearly be regarded as an officer of B. M. And Co.

(15) I may at this stage refer with advantage to the definition of the word "manager" which is given in Section 2(24) of the Act which says "manager" means an individual subject to the superintendence, control and direction of the Board of directors, has the management of the whole or substantially the whole of the affairs of a company and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not. The definition of the word "manager" is very wide, and whatever be the nomenclature employed by the parties, if large powers of management of substantially the whole business of the company are vested in a person then that person becomes the manager. Looking to the terms of the power of attorney, there cannot be any doubt that qua the affairs of the company in the partnership defendant No. 2 is a manager. It is argued both by Mr. Amin and by Mr. Nariman that B. M. And Co., are doing several businesses one of them being that of managing agency and being partner in the Agarwals and that the two power holders have nothing to do with the rest of the business of B. M. And Co, and therefore they cannot be regarded as officers of the company. The argument sounds a little strange. If a company has got a dozen branches and employs managers to manage the branches it will not be possible to hold that such managers are not either the employees or officer of the company. Though, therefore, defendant No. 2 may be entrusted with the management of the affairs of the company qua the Agarwal's he is in no better and no worse position than that of a manager of a branch who is nothing but an employee of the company.

(16) Mr. Amin argues that as the defendant No. 2 holds only power of attorney, he cannot be called an officer. He has invited my attention to Secs. 193(3), 199 and 204 of the Companies Act and argued that in order that a person be called an officer of the company, there must be a designated place and there must be a method of appointment. He has also referred to sections regarding remuneration like sections 199 (1), 200 and 204. It is true that these sections speak of appointment of officers and their remuneration. In support of his argument Mr. Amin has invited my attention to the case of *In re, Great Western Forest of Dean Coal Consumers Co. (Ltd) Carter's Case*, (1886) 31 Ch. D 496, where it was held that a solicitor who acted as such in the ordinary course of his duties as a solicitor as he would have done for other clients could not be regarded an officer of the company. On the other hand in the case of *In re, Liberator Permanent Benefit Building Society*, (1894) 71 Law Tim 406; 2 Man 100 a solicitor who was in the regular employment of the company was held to be an officer of the

company. I do not think these cases support Mr. Amin.

(17) Strongest reliance, however, is placed on *In re. Western Countries Steam Bakeries and Milling Co.* (1897) 1 Ch 617. In that case Lord Justice Lindley observed at p. 627 as follows:

"But to be an officer there must be an office, and an office imports a recognised position with rights and duties annexed to it, and it would be an abuse of words to call a person an officer who fills no such position either *de jure* or *de facto*, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word."

I have no hesitation in saying, that assuming that this must be the test even under the present Act it is satisfied in case of defendant No. 2. Appointment to an office need not be any particular words; nor need it be within a particular frame work. This Court said in *Deorao Laxman Anande Vs. Keshav Laxman Borkar*, that

"the word "office" does not necessarily imply that it must have existence apart from the person who may hold it. In order to make use of the special knowledge, talent, skill or experience of certain persons, posts are created, which exist only for so long as they hold them. It will be difficult to hold that such persons are not holders of office."

As stated by me earlier, it is not that defendant No. 2 is merely a delegate of the directors for the purpose of certain ministerial work; it is the company who has delegated all its powers to him to be exercised as he deemed fit, may be because of his knowledge, talent, skill or experience. I fail to see if the position he occupies is not "office" what can be an office? Even otherwise in view of the wide definition of the word "manager" I have not the least doubt that defendant No. 2 satisfies the test of being a manager though not actually called so. As to remuneration, decided cases do not require that there should necessarily be remuneration attached to an office. He must under these circumstances be regarded as an officer of B. M. And Co.

(18) Even on the question of remuneration I am not prepared to take the answer of defendant No. 2 at its face value. Defendant No. 2 stated that he was merely a power of attorney holder and was not getting any remuneration for the work that he did. It is doubtful, however, if these gentlemen would devote their whole time for the management of the affairs of the company out of charitable motives. The plaintiff requested that defendant No. 2 should offer himself for examination before the Court. Technical objections were taken by the learned Counsel that he could not be and ought not to be called upon to give evidence for plaintiff. It has been often pointed out that it is the duty of parties to place the best evidence before the Court. The practice of refusing to enter the witness-box when called upon to do so and requiring the plaintiff to call the defendant as his own witness has also been deprecated. It is clear, therefore, that he was shy of giving evidence in Court. Under these circumstances I would be justified in drawing an

inference against him and hold that he derived some remuneration.

(19) It is clear that the election of defendant No. 2 is hit by clause (d) read with Section 261(1)(a).

(20) The alternative argument of Mr. Gupte is based on the law of partnership. A partnership firm as such has no legal entity but is merely a compendious name for all partners together. He therefore says that each partner must be regarded the Managing Agent of the Mills. Added to this he relies on the fact that each one of the partners was a signatory to the agreement. It may however be assumed for the purpose of this case that the agreement was by the firm of Agarwals. He relies on the case of Ramabhen A. Thanawala Vs. Jyoti Ltd. and Others, . In this case, the principle was applied in reference to Section 348 of the Act. It is gratifying to note that the Legislature amended the section in conformity with the view of the Court instead of leaving it to interpretation.

(21) The argument of Mr. Amin that the scheme of the Act prevents the application of this principle also does not impress me though at first sight it appears attractive enough. He refers me to several sections in the Act. In Section 2 subsection (3) (4) and (25) firm is specially dealt with. All petitioners in a firm may not be individuals but may be corporate bodies and firms. Comparison of these clauses shows that special provision in respect of firm is made to bring within the meaning larger class of persons than would have otherwise been possible. This could not have been achieved by the application of general principles. Sections 221, 332, 334, 336, 337 are also referred to. Section 221 merely applies the general law. It may be that it was intended to avoid the argument that the partner who did not take part in the management could not be liable. Same is the case with Section 332(5); moreover, it is a penal section and may be intended to make the provision certain. Section 334 extends the principle inasmuch as it provides that the Agency will terminate on the insolvency of a single partner. By Section 34 of the Partnership Act insolvency of a single partner does not dissolve the firm. These provisions are made as a matter of caution to prevent escape by interpretation. Even in Section 261 provisions regarding a firm had to be made as the application of general law may not have been effective. There is nothing in its scheme which should make the application of general law inappropriate.

(22) In the case of an individual "Associate" has been defined to include a large class of persons who could not under ordinary circumstances have been brought within it. Can there be then any justification, where the managing agent happens to be a firm for excluding the associate of a partner although both in law and in fact the partner exercises all and every power that the firm could exercise? Exclusion would rather be strange. I do not see any injustice in applying the general principle. In view of the other provisions of the Act and having regard to the objects of the Act in general and of Section 261 in particular I am inclined to accept Mr. Gupte's argument, that each of the partners must be regarded a managing agent and if that is so it cannot be argued that defendant No. 2 is not

an associate of B. M. And Co., under clause (d) of subsection (3) Section 2 of the Companies Act, total number of members being only twenty-three.

(The rest of the judgment is not material for the purposes of this report).

(23) Appeal allowed.