

(2015) 08 CAL CK 0080
In the Calcutta High Court
Case No : C.O. 908 of 2015

Royal Calcutta Golf Club

APPELLANT

Vs

Lalit Kumar Jhalaria

RESPONDENT

Date of Decision : 12-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Companies Act, 1956 — Section 397, Section 398

Citation : (2017) 1 CalLT 215 : (2017) 1 ICC 898

Hon'ble Judges : Harish Tandon, J.

Bench : Single Bench

Advocate : Mr. Anirban Bose, Mr. Suvadeep Sen and Mr. D.N. Banerjee, Advocates, for the Opposite Party; Mr. Anindya Kr. Mitra, Sr. Advocate, Mr. Siddhartha Mitra, Sr. Advocate, Mr. Soumya Roy Chowdhury, Mr. Deepan Ku. Sarkar and Mr. A. Deb, Advocates, for the Petitioner

Final Decision : Disposed Off

Judgement

Harish Tandon, J. - The order no. 61 dated December 19, 2014 passed by the learned Civil Judge (Junior Division), First Court, Alipore in Title Suit No. 2132 of 2007 rejecting an application under Order 7, Rule 11 of the Code is assailed in this revisional application.

2. The plaintiffs/opposite parties filed the aforesaid title suit for declaration that the Annual General Meeting (AGM) held on 31st August, 2007 be declared, illegal, void and not binding being in violation of Article of association of the club. The following reliefs are claimed in the plaint:

"The plaintiff, therefore, prays for a decree against the defendant Club:

(a) for a declaration that the aforesaid Annual General Meeting held on 31.08.2007 and the decisions taken therein are illegal, invalid and void;

(b) for a declaration that the Extraordinary General Meeting proposed to be held on 28.12.2007 is illegal, invalid and void;

(c) for permanent injunction restraining the defendant Club from alienating any land in its possession for establishing a Hotel."

3. The fact emerged from the plaint are adumbrated herein below:

(a) The defendant/petitioner is a Company and registered with the Companies Act, 1956 having 3100 members. The main object is to promote and develop a sport known as Golf.

(b) The plaintiff is a permanent member of the defendant/petitioner-club since 1985.

(c) A notice dated 19.07.2007 is issued by the club for holding an AGM on August 31, 2007 under Article 57 of the memorandum and article of association. In course of the AGM, a fresh agenda was circulated which is in gross violation of Article 57 of the memorandum and article of association and any decision thereon is illegal and bad.

(d) Subsequently a circular dated 08.09.2007 was circulated amongst the members of the said club detailing the salient points discussed in passed in an AGM held on 31st August, 2007. Apart from the appointment of the Committee for the year 2007/2008, a further resolution was passed by majority of show of hands authorizing the captain to negotiate the long term lease of the land for the hotel project.

(e) A further notice was issued on 1st December, 2007 for holding an extraordinary general meeting of the members on 28 December, 2007 to pass both ordinary and special resolutions which includes the authorizing of the captain of the club to negotiate and finalize an agreement with the appropriate party/parties for establishing a hotel project at 6.1 acres of plot of land (located north east of 3rd fairway, opposite to TV tower) of the club's property on any basis, other than out right sale of the property.

(f) The aforesaid resolution is contrary to the object and purposes for which the club is established indicated in memorandum thereof. In the backdrop of the aforesaid facts narrated in the plaint, the above mentioned reliefs are claimed.

4. An application for temporary injunction was taken out on the basis of the aforesaid facts praying almost the identical relief as claimed in the plaint to restrain the defendant/petitioner from giving effect to the impugned resolution and also from alienating and/or encumbering any land of the club for establishing a hotel. Both the Courts rejected the application for temporary injunction and the matter ultimately reached before this Court in C.O. No. 3317 of 2009. The order disposing of the said revisional application reveals that the Trial Court rejected the application for temporary injunction as the suit is not maintainable because of the embargo created under Section 10 GB of the Companies Act. Though the Appellate Court did not approve the finding of the Trial Court on maintainability of the suit but affirmed the ultimate decision as the majority members have unanimously decided to go ahead with the hotel project and, therefore, at the

instance of the plaintiff, injunction should not be passed. Before this Court, the defendant/petitioner fairly conceded that there was no bar in maintaining the suit but defended the ultimate decision of both the Courts below by which the application for temporary injunction was rejected. In course of the hearing, the defendant/petitioner pointed out that clause 3 (g) of the memorandum of association empowered the defendant/company to sale, improve, manage, develop, lease, mortgage, dispose of or other wise deal with all or any of the property of the Company and, therefore, the decision to go ahead with the hotel project could not be in contravention to the object and purpose of the petitioner club. The Co-ordinate Bench observed that though the power to sale or deal with the property of the club is present in the memorandum of association but the same cannot be exercised in total disregard to the ultimate object for which the claim is formed. Ultimately the revisional application was disposed of restraining the defendant/petitioner to maintain status quo with regard to alienation of the suit property till the disposal of the suit.

5. Though the Court further requested the Trial Court to dispose of the suit expeditiously, the defendant/petitioner was advised to proceed under Order 7, Rule 11 of the Code seeking rejection of the plaint. The prayer for rejection of plaint is based on the facts that once the High Court in revisional application held that the petitioner club had a right to sale and/or dispose of any part of its property and the club was not trying to allowing any land in its possession for hotel project, the suit has become infructuous. It is further stated that the challenge is made to an AGM dated 31st August, 2007 only when three subsequent AGMs were held adopting the resolutions and, therefore, the suit is not maintainable. Lastly the rejection of plaint is sought as the suit is barred under the Specific Relief Act as well as the Company Law and the plaintiffs has no cause of action to suit.

6. The Trial Court rejected the said application as the grounds on which the rejection is sought requires determination after full-fledged trial and further held that the plaint cannot be rejected under Order 7, Rule 11 of the Code.

7. Mr. Mitra, the learned Senior Advocate for the petitioner confined his argument before this Court on other points than the plea of bar under Section 10GB of the Companies Act. Firstly, he attacks the impugned order that an individual member/shareholder of the petitioner company cannot maintain the suit as it is not a derivative action in absence of any leave under Order 1, Rule 8 of the Code. He submits that the plaint does not disclose any personal or individual cause of action against the petitioner company and, therefore, the plaint is bereft of any cause of action. To buttress the aforesaid submission, the reliance is placed upon a Division Bench judgment of this Court in case of Asansol Electric Supply Co. and Ors v. Chunilal Daw & Ors; reported in 75 CWN 704, Jhajharia Bros. Ltd. v. Sholapoor Spinning & Weaving Co. Ltd. reported in AIR 1941 Cal 174.

8. Secondly, he submits that the suit has become infructuous in view of the subsequent events as three subsequent AGMs of 2008, 2009 & 2010 have been

held and the resolutions have been passed and, therefore, the plaint should be rejected. In support of the aforesaid contention, the reliance is placed on the judgment of the Supreme Court in case of Shipping Corporation of India Ltd. v. Machado Brothers & Others; reported in (2004) 11 SCC 168.

9. Thirdly it is submitted that though some of the clauses from memorandum and article of association are incorporated in the plaint but the relevant clause which permits the power of the club to sale, alienate, mortgage or deal with any of its property has been suppressed. He further submits that the Court can look into the document produced for the first time by the defendant if the reference whereof can be traced from the plaint for the purpose of rejection of plaint under Order 7, Rule 11 of the Code. He says that if the document is not appended and/or disclosed in the list of documents required at the time of presentation of plaint, the Court shall look into the said document produced for the first time by the defendant under Order 7, Rule 11 of the Code if the foundation of the plaint case is based thereupon and placed reliance upon a judgment of this Court in case of Punjab National Bank v. Britannia Industries Ltd. reported in (2001) 2 Cal LT 219(HC), Bhagwan Das v. Goswami Brijesh Kumarji & Ors; reported in AIR 1983 Raj 3 and in case of SNP Shipping Services Pvt. Ltd. & others v. World Tanker Carrier Corporation & another reported in AIR 2000 Bombay 34. Lastly he submits that the suit which is per se vexatious and devoid of actual cause of action should be nipped in the bud as held in case of I.T.C. Limited v. Debts Recovery Appellate Tribunal & Others; reported in (1998) 2 SCC 70.

10. The opposite party refuted the contention of the petitioner saying that despite the provision of Section 397 & 398 of the Companies Act, the civil suit is maintainable if the challenge is made to a validity of the meeting which is per se illegal and placed reliance upon a judgment in case of Dr, T.M. Paul v. City Hospital (Pvt.) Ltd. & Others; reported in 97 Company Cases 216 and in case of Ravinder Kumar Jain v. Punjab Registered (Iron & Steel) Stockholders Association Ltd. reported in (1978) 48 Com Cases 401. To counter the submission relating to derivative action and leave under Order 1, Rule 8 of the Code, it is submitted that if a personal right of a member is infringed by any action of the majority, the suit is maintainable as held in case of National Sports Club of India v. Nandlal Dwarkadas Chhabria reported in 1997 (3) BomCR 565. It is vehemently submitted that the statements which does not appear from the plaint cannot be looked into except for the limited purposes that it would be a futile exercise to allow the suit to continue being vexatious and/or abuse of the process of the Court as held in case of Bijon Kumar Mallick v. Associated Builders Corporation reported in 2015 (2) CHN 434.

11. It is strenuously submitted that by a resolution dated 31st August, 2007, a decision was taken to encumber and/or deal with the property of the petitioner club for setting up hotel which is unconnected and/or unrelated with the object of the club which is primarily to promote the sports namely Golf.

12. According to the learned Advocate for the opposite party, an individual

member can challenge the resolution taken in the AGM if it is violative of memorandum and article of association of the club having numerous members and the leave under Order 1, Rule 8 of the Code is not mandatory. Lastly it is submitted that this Court in an earlier revisional application maintained the order of injunction even after noticing the clause 3 (g) of the memorandum and article of association and directed the Trial Court to expedite the suit, the application for rejection of the plaint based on the said clause is not maintainable.

13. From the submissions of the respective counsels, it is relevant to narrate the facts from the plaint for the purpose of Order 7, Rule 11 of the Code. It is a settled proposition of law that the Court shall confine its perusal and scrutiny to the averments made in the plaint or the documents annexed thereto when the rejection is sought on the ground that the plaint does not disclose cause of action or is barred by law. The suit as it appears is a simpliciter suit for declaration that the AGM held on 31st August, 2007 was in violation of the Article of association of the club and the decision taken therein is illegal, void and not binding being opposed to clauses 3(a), (d) & (e) of the memorandum and article of association of the defendant club. The plaint case proceeds that in the notice for AGM to be held on 31st August, 2007, there was no agenda for setting up the hotel project which was circulated to the members present in the said meeting and was thereafter passed by majority by raising of hands. It is further stated that Article 57 of the memorandum and article of association relating to the business of the AGM stipulates the election of captain, committee, appointment and fixation of remuneration of auditors as ordinary business and the special resolution shall be transacted only after compliance under Section 173 (2) (3) of the Companies Act. The special resolution being not in conformity with the said clause is, therefore, bad and is also opposed to the object for which the club was established.

14. It is undeniable that the application for temporary injunction was dismissed by the Trial Court as the Plaintiff/Opposite Party failed to make out any prima facie case and affirmed by the Court of appeal below, on the other point that the suit is otherwise hit under Section 10GB of the Companies Act. Before the revisional Court, the defendant petitioner conceded that the suit is not hit by the provision of Section 10GB of the Companies Act and, therefore, the plea under Order 7, Rule 11 of the Code in this regard cannot be taken as a ground for rejection of the plaint. A point which was agitated at an earlier point of time in course of the suit having decided, cannot be allowed to be agitated at the different stages of the same proceeding. The argument was restricted on Clause 3(g) of the memorandum and article of association permitting the club to sale, mortgage and/or deal with all or any of the property of the Company and, therefore, the resolution in this regard cannot be impinged. Even after noticing the said clause, the Court held though the Company prima facie appears to have right to deal with its own property but the Court cannot ignore the facts that it is in total disregard to the primary object for which the Company was formed and directed the Company to maintain status quo with regard to the alienation of the

suit property till the disposal of the suit.

15. From the meaningful reading of the observations made by this Court in an earlier revisional application, it appears that though the power to sale or deal with the property of the Company is conferred in the memorandum and article of association but the same should be in consonance with the object and purposes for which the Company is formed.

16. However, a plea was taken before this Court that since the memorandum and article of association of the petitioner club is neither produced at the time of presentation of plaint nor disclosed in the list of documents appended thereto, the Court shall not look into such document produced at the instance of the defendant for the purpose of Order 7, Rule 11 of the Code. The reference in this regard can be made to a single bench decision of the Rajasthan High Court in case of Bhagwan Das (supra) wherein it is held:

" Learned counsel for the opposite party may be right in urging that if the plaint is based on a document, then such a document may be considered as forming part of the plaint itself and the document can also be looked into, while considering the averments of the plaint, for the purpose of deciding the question that the plaint discloses a cause of action or not. But it has to be remembered that the averments made in the plaint as well as the contents of the document which may constitute part of the plaint, can be looked into on the face value thereof and the question relating to the validity or invalidity of the document cannot be considered at the stage of deciding an application under Order 7, Rule 11 , C.P.C."

17. The ratio laid down in the above noted report is accepted and/or applied in case of SNP Shipping Services Pvt. Ltd & Others; (supra) in following words:

"17. * * * * *

In India under Order 7, Rule 11 the plaint can be rejected where it does not disclose a cause of action or where the suit appears from the statement made in the plaint to be barred by any law. For the purpose of deciding that the plaint "does not disclose a cause of action", the Courts generally look only at the plaint. However, there is a rider to this rule, that when the plaint is based on a document, the same can also be looked into. This proposition has been recognised by the Rajasthan High Court in the case of Bhagwan Das v. Goswami Brijesh Kumarji, (AIR 1983 Rajasthan 3). In paragraph 7 of the aforesaid judgment, it is observed as follows:-

(7) Learned Counsel for the opposite party may be right in urging that if the plaint is based on a document, then such a document may be considered as forming part of the plaint itself and the document can also be looked into, while considering the averments of the plaint, for the purpose of deciding the question that the plaint discloses a cause of action or not. But it has to be remembered that the averments made in the plaint as well as the contents of the document

which may constitute part of the plaint, can be looked into on the face value thereof and the question relating to the validity or invalidity of the document cannot be considered at the stage of deciding an application under Order 7, Rule 11 . CPC."

* * * * *

18. The aforesaid point is set at rest in a recent decision rendered by the Supreme Court in case of Church of Christ Charitable Trust & Education Charitable Society v. Ponnamman Educational Trust reported in (2012) 8 SCC 706, it is held:

" It is settled law that where a document is sued upon and its terms are not set out in the plaint but referred to in the plaint, the said document gets incorporated by reference in the plaint. This position has been reiterated in U.S. Sasidharan v. K. Karunakaran reported in (1989) 4 SCC 482 & Manohar Joshi v. Nitin Bhaurao Patil reported in (1996) 1 SCC 169."

19. The ratio which emerged from the aforesaid reports is that the document on which the cause of action is pleaded in the plaint, if not disclosed or included in the list of documents, becomes part of the plaint by necessary reference and can be looked at under Order 7, Rule 11 of the Code.

20. The first clause of the memorandum and association is to promote the game of Golf and affording to its members all usual privileges, advantages, conveniences and accommodation of a golf club. Clause 3(e) thereof stipulates the lay out and prepare, adopt and improve the lands for the purpose of playing golf, bowls, or other games or any kind of athletic sports, amusement or recreations and to construct and/or demolish any building or erection not so required which may seen directly or indirectly to the Company's objects. Though the power to sale or deal with all or any of the part of the property of the Company is also incorporated therein but it is to be interpreted harmoniously with the different clauses of the memorandum and not in isolation thereof.

21. The Petitioner-Company has more than 3,000 members and the challenge is made by one of its member to the resolution taken in an AGM alleging that the same is contrary to the memorandum and article of association as well as the object and purposes for which the Club was formed. The decision taken by the majority of the shareholders/members is not ordinarily amenable to be challenged before the Court except when it is fundamentally against the memorandum and article of association and de hors the object for which the club exists.

22. The reference in this regard can be made to a Division Bench judgment of this Court in case of Asansol Electric Supply Co. and Ors (supra) wherein it is held:

"12. The law on the point has been clearly laid down in a recent decision of the court of appeal in (4) Edwards v. Halliwell, 1950 2 All. Er 1064. In that case, it

has been held by Jenkins, L.J. that the cases falling within the general ambit of the rule in (1) *Foss v. Harbottle* are subject to certain exceptions, namely, (1) where the act complained of is wholly ultra vires the company or association, (2) when the act complained of is one which can validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, and (3) when the individual members sue not in the right of the company but in their own right to protect from invasion their own individual rights as members.

13. The exception which has been made to the rule in (1) *Foss v. Harbottle* in the English decisions referred to above has been adopted by the courts in India. In (5) *Ramkissendas Dhanuka & Ors; v. Satya Charan Law 50 CWN 310*, it has been held that the principle that the Court will not generally interfere with the internal affairs of a company except at the instance of the majority of the shareholders, is applicable only where the act complained of is merely irregular and not when it is ultra vires. The decision in *Dhanuka's* case has been approved by the Privy Council in an appeal from the decision in that case (See AIR 1950 Privy Council 80).

14. It is now an accepted principle of law that where an act by the majority of the share-holders is merely irregular and can be rectified by the majority of the share-holders, an action is not maintainable against that act, but if the act is ultra vires the company itself and is beyond the powers of the members of the company or its share-holders to ratify that act or to rectify the same, an individual member of the company may sue the company and its directors, for himself and on behalf of the other share-holders for declaring that act as illegal and for consequential reliefs. In such actions, however, the plaintiff has no larger right to relief than the company would have as plaintiff."

23. The judgment rendered in case of *Jhajharia Bros. Ltd.* (supra) relied upon by the petitioner laid down that the suit at the instance of an individual shareholder of the Company on his behalf and on behalf of other unspecified shareholders against the Company alleging the fraud upon the minority may not have been perfectly instituted but carved out an exception in these words:

"7. I propose, as shortly as I can without going into the cases in detail, to explain my understanding of the matter. There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts ultra vires. There is no question of ultra vires in this case and I propose to confine the discussion to suits other than those based upon complaints of acts ultra vires, although I am not suggesting that there is any fundamental difference in principle. Suit to restrain acts ultra vires and suits to restrain certain acts about to be discussed notwithstanding that the acts have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of an ultra vires act, because it is not an act within the constitution. In the other class of cases the

Court interferes upon a different basis."

24. The suit at the instance of an individual shareholder, alleging the infringement of a right for an action and the majority shareholders being opposed to the memorandum and article of association, cannot be said to be an imperfect suit liable to fail on the parameters of Order 7, Rule 11 of the Code. Mere reference of more than 3100 members does not, ipso facto, raise a presumption that the suit is not maintainable in absence of any leave under Order 1, Rule 8 of the Code. Section 9 of the Code of Civil Procedure postulates that the Civil Courts have jurisdiction to try all suits of civil nature unless there is an express or implied bar. It is no longer *res integra* that such exclusion should not be readily inferred and the rule of construction being that every presumption should be made in favour of his existence rather than exclusion of the jurisdiction of the Civil Court.

25. Section 397 & 398 of the Companies Act provides a remedy which is of preventive in nature so as to bring an end to oppression and mismanagement on the part of the controlling shareholders but does not in express terms take away the power of the Civil Court to declare a resolution to be *ultra vires* to the memorandum and article of association.

26. The subsequent events can be taken note of if the original proceeding has become in fructuous as it would be a futile exercise to allow such suit to continue. It is based on the legal maxim *ex debito justitiae* i.e. it is a duty of the Court to take such action which is necessary in the interest of Justice. Every facts germinated after the litigation having a substantial nexus and/or bearing on the relief claimed in the suit may be taken into consideration for ends of Justice.

27. The reliance can be placed in this regard to a judgment in case of Shipping Corporation of India Ltd.(supra), it is held:

"25. Thus it is clear that by the subsequent event if the original proceeding has become in fructuous, *ex debito justitiae*, it will be the duty of the court to take such action as is necessary in the interest of justice, which includes disposing of in fructuous litigation. For the said purpose it will be open to the parties concerned to make an application under Section 151 CPC to bring to the notice of the court the facts and circumstances which have made the pending litigation in fructuous. Of course, when such an application is made, the court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become in fructuous or not."

28. The petitioner-club says that the challenge is made to a resolution dated 31st August, 2007 when, in fact, the resolution have been adopted in a subsequent AGMs which are not a subject-matter of the instant suit. In all the subsequent AGMs, the resolution adopted in the AGM dated 31st August, 2007 is ratified and confirmed and a consequential steps and/or the consequential resolution have been taken therein. None of the resolutions adopted in the subsequent AGM have virtually superseded and/or withdrawn resolution taken in AGM dated 31st

August, 2007. If the resolution in the subsequent AGM are based upon the parent resolution taken in the first AGM which is a subject-matter of the suit, it cannot be said that the suit become in fructuous.

29. This Court, therefore, does not find that the suit become in fructuous because of the subsequent events.

30. As indicated above, the cause of action pleaded in the plaint is clear and explicit in consonance with the reliefs claimed therein and it cannot be said that the plaintiff have created an illusory cause of action with the clever draftsmanship which amounts to abuse of the process of the Court.

31. This Court, therefore, does not find that the order impugned deserves any interference.

The revisional application fails.

However, there shall be no order as to costs.

Later.

After delivery of judgment, the petitioner prays for stay of the operation of the order which, upon due consideration, is rejected.