
(1940) 02 CAL CK 0024
In the Calcutta High Court

Sati Nath Mukherjee

APPELLANT

Vs

Suresh Chandra Roy and Others

RESPONDENT

Date of Decision : 12-02-1940

Acts Referred:

Penal Code, 1860 (IPC) — Section 144

Citation : AIR 1941 Cal 136

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—I would have taken time to consider the typed note handed up to me by Mr. Roy on the question of law but for two reasons, one is that the real point is one of those which must be largely a question of opinion on the construction and language of the Articles of Association, and upon that I have come to a conclusion; the other is that I am anxious that the next suit should be called on and that this matter should go back to the company, if that course is possible. The real trouble with this unfortunate matter is that in this company there are at least three groups of opinion. There are, first, the amalgamationists; there are, second, the isolationists; and there are, third, the re-insurers, who are amalgamationists in another form. The question is, which of these groups is the genuine Genuine Insurance Company. That is the essence of the matter. As a result, there have been since the latter part of October last two separate organizations, two rival boards of directors.

2. This suit is in substance one by a member of what I shall call the "c" board for declarations which will oust the "b" board. The meaning of these two symbols will appear from the facts which in a simplified form I will now set out. The company is an Insurance Company on a modest scale. Recent legislation has imposed certain presumably necessary burdens or conditions upon such insurance companies in the interests of policy-holders. The directors, whom I will call the "a" board, who were functioning prior to 1st October 1939, were as follows: I number them, because although I am at this stage now more familiar with their

names, the names are at first very confusing: (1) Kumud Chandra Roy Chowdhury; (2) Khetra Mohan Chatterjee; (3) Sailendra Nath Bose. These three had been elected by the share-holders; (4) Subodh Mitra (elected by the policy-holders); (5) Sailen Sircar; (6) Hiralal Ghose; (the last two being appointed by the managing agents, and therefore, under the articles, permanent).

3. On 29th September 1939 was issued a notice of the ordinary general meeting to be held on 16th October, with the usual business including the election of directors in place of the retiring directors. On 1st October, there were two directors' meetings, at which a proposal to amalgamate with the Aryasthan Insurance Company was discussed and in substance adopted, a course due to the pressure of the new Act. The proposal to amalgamate involved the bringing in of the directors of the latter insurance company, and the six persons whose names I am about to give were on 1st October co-opted as additional directors : (1) Sir Manmatha Nath Mukerji, (2) the Raja of Nasipur, (3) Khan Bahadur M. A. Momin, (4) Rai Bahadur A. C. Banerji, (5) Mr. Santosh Kumar Basu and (6) Miss Jyotirmoyee Ganguli. Mr. S. C. Roy, manager of the Aryasthan Insurance Co., was appointed manager. It was also decided that three members of the "a" board should resign as from that date in order that the total number should not exceed the limit of nine. On 7th October, a further board meeting was held, at which it was decided to convene an extraordinary general meeting to obtain the final approval of the shareholders to the amalgamation. That notice was sent out on 11th October for the 31st.

4. On 16th October the ordinary general meeting was held, 23 members being present. Resolution 2 provided that only two out of the retiring directors were to be re-elected, Professor Kumud Ray Chowdhury and Hiralal Ghose, although, if I remember rightly, Hiralal Ghose was permanent as the managing agents' appointee. At this meeting nothing was said about the six co-opted directors, and no election in their place was either mooted or effected. There is no evidence before me indicating whether the company was or was not made aware of their co-option. I do not however draw the inference suggested by counsel for the plaintiff that the company decided to reduce the number of directors to two only. Indeed, if an inference is to be drawn, I should infer that the re-election was confined to two, for the reason that the election of others was contemplated. Nor has there been any evidence that on 16th October there was any group of parties on the question of amalgamation, which of course on that date had not been put before the company. I should have mentioned that between 1st October and 16th October, the board which continued to function and which may now be designated the "b" board, consisted of the six co-opted directors and three of the "a" board, Nos. 2, 3 and 5. After 16th October, the "b" board purported at any rate to function and consisted of the six co-opted members, with Kumud Chandra Ray Chowdhury and Hiralal Ghose. Subodh Mitra continued as the policy-holders' director.

5. Owing to the disputes which subsequently arose challenging the status of the

"b" board after 16th October (it is not disputed between 1st October and 16th October) parallel sets of minute books, both for the company and the directors' meetings were kept. In the "b" board's minute book is a minute which has not been put in evidence, but which I shall allow to remain on the record, of 30th October 1939. I use it for no other purpose than to explain the history of the matter. It appears at this meeting, as appears from the documents put in, that certain disputes arose, as the result of which the "b" board co-opted the Chief Presidency Magistrate and sought the assistance of the police, one of the factors which has such an effect in promoting business in Bengal. The next day was that fixed for the extraordinary general meeting, and according to the records there were two meetings at the same time and at the same place, one under the chairmanship of Mr. Bhubaneswar Nag, and one under the chairmanship of Khan Bahadur Abdul Momin. It is not alleged that they occupied the same chair, but otherwise, so far as the records are concerned, the meetings coincide. The question is which was the genuine meeting. The Bhubaneswar Nag meeting resolved against the amalgamation. The Khan Bahadur Abdul Momin meeting unanimously adopted the amalgamation. Police assistance, so essential on all these business occasions, having been obtained, the "b" board remained in possession of the field and, I understand, of one set of records, and I also understand, of the funds of the company, Mr. S. C. Roy continuing as manager, supported by an order u/s 144, Criminal P. C.

6. From this date, as I have already said, the two boards functioned independently and on parallel lines. I gather, that Kumud Chandra Ray Chowdhury and Hiralal Ghose ceased to function as a part of the "b" board and constituted themselves a limited board of their own. On 8th November they proceeded to create what I call throughout the case the "c" board, by the resignation of Hiralal Ghose, the co-option first of Ramendra Nath Mukerji, and subsequently at a meeting of the same date at which Ramendra Nath Mukerji presided, the co-option of another six persons, of whom the plaintiff is one. Professor Ray Chowdhury and Sailendra Mitra subsequently resigned on 21st November 1939, and the "c" board therefore after that date was composed of persons exclusive of the nine included in the "b" board. Now, the "C" board in the normal course, if anything is normal in this matter, notified the Registrar of Insurance Companies that its members were the proper board of directors of the company. The "b" board, of course, also notified the Registrar of insurance companies to the same effect with regard to its members, and we have therefore parallel registrations. The "c" board also I see from the records attempted to obtain the assistance of the police but was less successful. The "C" board finding themselves in the same difficulty as the "a" board, according to them as will appear from their resolutions, by reason of the misconduct of the "b" board, were compelled to enter into a similar or analogous proposal, which is called "re-insurance" with another company called the Aryasthan Insurance Co. The relevant resolutions are in December 1939. It was at this stage, I presume, that the third group of opinion to which I have referred, the isolationists, who like

neither the "b" board's amalgamation nor the "C" board's amalgamation, came into existence. Meanwhile, on dates which I have not for the moment before me, the deposit under the new Insurance Act not having been paid, the Government took steps to cancel the registration certificate of the company.

7. As a result of this unfortunate imbroglio, we have an imposing set of proceedings: this suit by a director of the "C" board, the next suit by a number of share-holders to obtain a decision as between the "a" board and the "C" board, the "a" opinion and the "c" opinion. There is an application to sanction the amalgamation under the Com-parries Act. There are, I understand, proceedings to challenge the decision of the Government. There are also proceedings in which the position of those supporting the "c" amalgamation is sought to be affirmed or established. At some stage of the proceedings, as to which I am not quite clear (I would be glad if counsel would inform me) the appointment of a member of the bar to act in place of the secretary of the company, presumably by way of an interlocutory safeguard was made by the Court. Those are the facts. The evidence before me consists of the oral evidence of Professor Kumud Ray Chowdhury, who was a member of all the boards, "a" "b" and "C," a most respectable gentleman, who gave his evidence very fairly and is a Professor of Geography, and the plaintiff, who is said, by himself, to have some knowledge of insurance.

8. Coming to the present suit, I can deal with technical questions very shortly. Among the prayers are two for declarations that the resolutions of the Bhubaneswar Nag meeting are valid, and those of the Khan Bahadur Abdul Momin meeting are invalid, that of course being what the suit is aimed at. But those reliefs were not pressed, nor, in my opinion, could they have been obtained in a suit framed as this suit is framed. I am also of opinion that as a matter of law Mr. Chaudhuri is right in his contention that in so far as this is a suit challenging the position of the "b" board and to remove them from the directorate, the suit is wrongly constituted. It is not necessary for me to go into the technicalities of the matter, because I expressed this opinion, to which I adhere, that in so far as it is a suit for a declaration that the plaintiff is a director and for the protection of his rights qua director, the suit lies. And in deciding that question on the facts of this case it may be necessary for me as a matter of fact and not for the purpose of proceeding to other reliefs or declarations to go into the question of the appointment of the "b" board because on the facts of this case the "b" board and the "c" board so to speak are mutually exclusive. Again, I do not as at present advised consider that a suit by A to establish the rights by declaration and injunction of B, C, D and E lies. But to the limited extent I have stated, in my opinion the suit is good, and so limited the only issue is whether the plaintiff is a director. It involves two subsidiary questions: (1) whether the B group of directors are directors, and (2) whether the plaintiff is a director or disqualified, because counter-attack has been made on his position.

9. The first question falls within a very small compass and the answer depends

upon the applicability and effect of Article 148 of the Articles of Association, for this reason, that the B board, for whom Mr. Chaudhuri appears, rely upon this article to validate their position and upon nothing else. Mr. Chaudhuri, in my opinion, exercised very sound discretion in not relying upon what is relied upon in his written statement, namely, a company meeting of 23rd October 1939. As a result the minutes of this meeting which appear at p. 29 of the brief but marked "not admitted" by the plaintiff have not been proved. Now Mr. Chaudhuri, while he has deprived us of a description which would have delighted the heart of Gilbert and Sullivan, has achieved two very desirable objects for his client, first, he avoided a finding on the lines of two very popular English sayings: "That a little company law is a dangerous thing" and second, "That girls rush in where Khan Bahadurs fear to tread." I do not mean to be flippant but to indicate that Mr. Chaudhuri was very wise. He achieved an even more important object because he excluded an argument (which as it has not been put before me I will say no more than that it appears highly plausible), namely that there was an actual meeting on the 23rd, either an adjourned or a distinct meeting, and that having regard to what took place then the application of Article 148 in the sense in which it has been construed by the ruling in *In re Great Northern Salt & Chemical Works; Ex parte Kennedy* (1890) 44 Ch D 472 does not apply, the position being, on the evidence that matters ended with the company meeting of 16th October.

10. Now this question of the applicability of Article 148 to co-opted directors is by no means easy especially to one like myself who has no knowledge of company matters. Summarising the arguments, the defendants rely upon the language of the articles coupled with the decision to which I have already referred in *In Re: Great Northern Salt & Chemical Works; Ex parte Kennedy* (1890) 44 Ch D 472 which ruled that this article or an article in similar though possibly distinguishable terms (this is a matter to which I shall have to refer again) was directory only, in other words, that there is a notional adjourned meeting and a notional re-appointment.

11. Counsel for the plaintiff have advanced a variety of arguments. Mr. Roy was called upon by the absence of his colleague to make the main address, and his full and careful argument was obviously the result of much midnight or early morning research into his extensive library, his point, I think, being constructed upon certain authorities which in justice to him I shall have to examine. Mr. Roy's point, for want of a better phrase I will for the moment designate as the "different posts," the shareholders' directors and additional directors point. Indeed as I understood him, this was really the only point upon which he desired to rely. I do not for a moment mean to indicate that he or any other counsel makes a binding admission about other points. As to that, I think he misunderstood me in the course of the argument. But the Court is entitled to know what point is being argued, and what is not being argued.

12. Mr. Ghose followed, and as I understood his points I may enumerate them as

follows : (a) On a proper reading of Article 151 re-election means re-election by directors, (b) That there was no notice for the meeting of 16th October setting out as business the re-election of additional directors with certain consequences. (c) And this must be an alternative point, that the company in fact determined not to re-elect on 16th October. (d) That Article 148 is not like the old Articles 62 and 82 of the English Schedules and is in our case mandatory, relying upon differences of language. (e) And lastly, that the last words of Article 151 must be read in the language of the Schedules to the Companies Act where after "re-election" appear "as additional directors", and that this involves that at the meeting there must be a proposal to appoint additional directors, and that that is a condition precedent to any re-election of those who have been additional directors.

13. I come back to Mr. Roy's point, and although, I think, I have followed the argument I still am not clear as to the philosophy behind it. It seemed to me, and so I put it to him in the course of the argument that his point must depend upon establishing that the vacancy created, by the two classes of retiring directors is in some way different, and I have not been able to discover how it is different. I asked him whether the vacancy was one which according to his argument must be filled by directors. This was not his point although it was a point taken by Mr. Ghose, and that would be logical. He did contend on the authority of a certain case with which I shall deal in a moment that the difference was this. That in the case of co-opted directors the vacancy is created before the meeting. His actual words if I remember rightly are that "he as a co-opted director is civilly dead before the meeting," whereas the shareholder's directors, to use Mr. Roy's expression, "only die at the meeting," and if this was so, certain consequences would follow. But I still think that his argument boils down to the question whether there are two species or varieties of vacating directors leaving two species or varieties of vacancies, and I cannot see it. My point of view, again without any desire to be flippant and only a desire to be clear, I expressed to Mr. Roy as follows: We have Professor Roy Chowdhury a shareholders' director, we have Khan Bahadur Mahomed Momin additional: director. That the void left by the former might be actually or physically different from the void left by the latter may well be, but the void left by them in law is to my mind precisely the same when they retire at or for the purposes of that meeting. They both lose their status; they are re-eligible purely as individuals. In the absence of a special article or in the absence of anything to be gathered from the articles, in my view, they are both eligible for re-election, and such re-election should take place at a company's meeting.

14. I quite follow that from this, coupled with Article 148 and the ruling in *In Re: Great Northern Salt & Chemical Works; Ex parte Kennedy* (1890) 44 Ch D 472 certain anomalies may follow; the company may find itself with a large number of additional directors appointed for another year which it had no intention of appointing. It may be that in certain cases the appointment of additional directors might be concealed from the company, but I have dealt with this case

on the basis that no fraud of that kind has been alleged or established. I do not again mean that my view on Mr. Roy's point necessarily decides the matter. I do not think it does, and I shall proceed to state in a moment after dealing with Mr. Ghose's points, what I consider to be the crux of the matter after having referred to the law or authorities upon which Mr. Roy has constructed his argument. Taking the cases in order of time, *Bluett v. Stutchbury's Ltd.* (1908) 24 TLR 469 I have not the case before me but my note is merely "director not re-elected-not a director." Nor if I remember rightly does this case establish anything further. *Blair Open Hearth Furnace Co., Ltd. v. Reigart* (1913) 108 LT 665 Mr. Roy used this for the proposition that director's directors were of a different quality to share-holder's directors. That they were a mutually exclusive body. Now, to some extent, while they are functioning, that is so, but as I read that case the decision amounts to no more than this: that where under a company's articles the maximum number of directors is fixed at seven but the company under another article has power to increase that number the company could not in a general meeting appoint additional directors that being a function delegated to the board, especially in view of the fact that it had not under the appropriate article expanded the number. I do not think that this case is an authority on the status of directors retiring at the general meeting, or establishes that in respect of the retirement of each class, different consequences ensue.

15. The next case, *Spencer v. Kennedy* (1926) 1926 Ch 125: This really relates to the operation of Article 148 or its corresponding article in the schedule and I may refer to it again when dealing with Mr. Ghose's point on the effect of the operation of the article in question. *Byre v. Milton Proprietary Ltd.* (1936) 1936 Ch 244: On this case again Mr. Roy relied for the proposition that there were two distinct species or varieties of directors, not only prior to the general meeting but also during the general meeting and that they were to be differently treated. He relied upon it specifically for the proposition that the additional directors die before the meeting and the others die during the meeting. But again, to my mind, the inference from the decision is to the contrary because in this case the Court relied upon a special article by which in the case of the share-holders' directors it was specifically provided that they should act as directors throughout the meeting. In my view therefore, so far as the law is concerned, there is no different kind of vacancy created on retirement at the general meeting.

16. Turning to Mr. Ghose's points: I am against him on the first. I do not read Article 151 in any other sense than "eligible for re-election in the company meeting." I do not think this point is strongly pressed. I deal next with his point to the effect that Article 148 is mandatory. Again I am against him. In my view, no stress is to be laid upon a difference in language in this article (Art. 82) the old Article 62 or Article 64. His remaining points which depending upon the circumstances of the case come nearer to what in my mind is the crux of the question, and indeed it may be that with the difference in language the point contended for by Mr. Ghose is the one which I am now going to formulate.

17. To my mind, the question reduces itself to one which may be simply formulated but not easy to decide, and that question is, "What ought to have taken place at the company meeting?" The language used is the language of ordinary life which in this connexion does not make it simpler. "What ought to have taken place?" On the one view, if the re-election of the additional directors could have taken place, it ought to have taken place. On the language it is difficult to avoid the conclusion that if it could and should, it ought. As against this, and this has been my main difficulty, can it be said that a directory and remedial provision should apply only where there has been a clear accidental omission? Can it be said that there was no such omission on 16th October 1939 because the matter was never before the meeting? That, in the facts of this case, it could not be before the meeting, or that the omission, if any, was on the part of the directors in not bringing it before the meeting, not an omission at the meeting. That in other words the company had no opportunity of making the omission and it is therefore not a meeting at which an election "ought to have taken place within the meaning of Article 148." That is the opposite contention to which it strikes me there can be the following rejoinder on the language of the articles, namely that at best it ought to have been put before the meeting, and if it ought to have been put before the meeting it ought to have taken place at the meeting. There still remains an omission to do something which should have been done at the meeting notwithstanding that that omission was due to an earlier omission. This I think is the essential point although I may not have expressed it with sufficient accuracy. It is a point upon which reading the sections there may be two opinions, but my opinion for what it is worth is, whatever view you take, there still remains something which ought to have been done at the meeting. For that reason I am of opinion that Article 148 does apply and not being mandatory the position of the "b" board is established.

18. With regard to the counter-attack upon the status of the plaintiff, although the plaintiff's position appeared by no means unassailable, the evidence was not conclusive. I was asked for an opportunity to give additional evidence on the point of default in the payment of calls, and subject to the objection of Mr. Ghose I allowed it. In view of my decision on the main point I do not propose to rely upon the evidence subsequently tendered. With regard to Mr. Ghose's point of law in answer to the counter attack on the plaintiff's position, and the authority cited by him, *Dawson v. African Consolidated Land & Trading Co* (1898) 1 Ch 6, I am by no means prepared without further consideration to hold that default in payment of call prior to appointment and continuing after appointment is not a disqualification, or even if the appointment be valid the director who is bound to vacate would be granted by this Court equitable relief. Nor that I would be bound to take into account the fact that the director seeking such relief has subsequently complied with the payment of the call. I have thought it right to decide upon the main point in the case. The injunction in this suit restraining the B directors from acting may be dissolved as there is a similar injunction in the next suit which will now be called on. The suit is dismissed with costs.