

(2015) 07 BOM CK 0216

In the Bombay High Court

Case No : Notice of Motion (L) No. 434 of 2015 in Suit (L) No. 146 of 2015

Sridhar Sundararajan

APPELLANT

Vs

Ultramarine and Pigments Limited and Others

RESPONDENT

Date of Decision : 16-07-2015

Acts Referred:

Companies Act, 1956 — Section 198, 267, 269, 269(2), 310

Companies Act, 2013 — Section 196, 196(3), 196(3)(a), 197, 267(a)

Citation : (2015) 128 CLA 435 : (2015) 192 CompCas 355 : (2016) 1 CompLJ 182 : (2015) 131 SCL 787

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Mysamy, Abhijeet C. Mahadeokar and Manal Dhanani, for the Appellant; Prembhari Thakkar, instructed by ANB Legal, Advocates for the Respondent

Judgement

G.S. Patel, J—The Notice of Motion seeks an order against the 2nd Defendant from functioning or continuing to exercise his powers as Chairman and Managing Director of the 1st Defendant-Company. I have heard Mr. Mysami, learned Counsel for the Plaintiff, Mr. Seervai, learned Senior Counsel for Defendant No. 2 and Ms. Thakkar, learned Counsel for the 1st Defendant. I have considered the material before me. With their assistance, I have also considered the statutory provisions applicable and the precedents cited.

2. A few facts are necessary. The 1st Defendant is a public limited listed Company. The 2nd Defendant was appointed as a Chairman and Managing Director of the 1st Defendant-Company on 13th August 1990. On 21st May 1998, the Plaintiff was appointed a Director of the 1st Defendant. On 1st August 2012, the 2nd Defendant was reappointed Chairman and Managing Director of the 1st Defendant-Company for a further five year term till 2017. On that date, the Plaintiff was also appointed a Joint Managing Director of the 1st Defendant-Company.

3. On 1st April 2014, the Companies Act, 2013 ("the 2013 Act") was brought into force. It introduced a new clause in Section 196(3)(a), one that did not have a corresponding equivalent in Section 267 of the Companies Act, 1956 ("the 1956 Act"). That clause apparently sets a lower and upper age limit of 21 years and 70 years respectively on the appointments and ""continued employment"" of Managing Directors, Whole Time Directors and Managers. The entire matter turns on an interpretation of this newly introduced statutory provision. For, it is the Plaintiff's case that since the 2nd Defendant attained the age of 70 years on 11th November 2014, his five year term as Managing Director, one that commenced on 1st August 2012, came to an end by operation of law on 11th November 2014. In Mr. Mysamy's words, on his 70th birthday, the 2nd Defendant earned himself statutory disqualification.

4. I will turn first to the provisions of Section 196.

(1) No company shall appoint or employ at the same time a managing director and a manager.

(2) No company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time:

Provided that no re-appointment shall be made earlier than one year before the expiry of his term.

(3) No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who

(a) is below the age of twenty-one years or has attained the age of seventy years:

Provided that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person;

(b) is an undischarged insolvent or has at any time been adjudged as an insolvent;

(c) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or

(d) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

(4) Subject to the provisions of section 197 and Schedule V, a managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in that Schedule:

Provided that a notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any:

Provided further that a return in the prescribed form shall be filed within sixty days of such appointment with the Registrar.

(5) Subject to the provisions of this Act, where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall not be deemed to be invalid."

5. We are concerned here with sub-section (3) and specifically with sub-section section (3)(a). This introduces an upper and lower age limit in regard to the appointments of Managing Director, any Whole Time Director or Manager of a public limited company. As regards persons who are below the age of 21 years, they may not hold or ever be appointed to any of these three positions. For them, there is no exception. The position is, however, slightly different for persons who attain the age of 70, for there the statute has a proviso.

6. The question is how should that proviso be read? Mr. Mysamy says that once the 2013 Act came into force, even existing appointments of Managing Directors would effectively be interrupted mid-tenure should the holders of these offices cross the age of 70. It would then, according to Mr. Mysamy, require a special resolution by the Company in general meeting to reappoint the person in question as Managing Director. Mr. Mysamy submits that the statutory intent is that the shareholders of the Company should know and be informed of the reasons why somebody over the age of 70 should hold office as a Managing Director. Some compelling reasons must be shown. Any other interpretation, according to him, would have the effect of nullifying the statutory and legal intent. Mr. Mulsamy relies on several decisions of the Supreme Court for the proposition that where the words of a statute are plain and clear, the language of the statute should not be changed by judicial interpretation, nor should words or meanings be imputed that plainly do not exist.¹ He also relies on the decision of the Supreme Court in *S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others*, AIR 1985 SC 582 : (1985) 1 SCALE 74 : (1985) 1 SCC 591 : (1985) 2 SCR 643 to submit that the scope of a proviso is to create an exception to the main provision, or to qualify it, but no proviso can be taken out of the context of the main provision to which it provides such as exception. He also submits on the basis of the decision in *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others*, (1987) 1 SCALE 100 : (1987) 1 SCC 424 : (1987) 2 SCR 1 : (1987) 1 UJ 586 that the use of a proviso is well established and it can never be used to wholly nullify the main or substantive legislative provision.

7. Mr. Seervai's response to this is, firstly, that the 2013 Act cannot possibly be

retrospective. For it to be so, it would necessarily have to explicitly say as much in so many words. Ordinarily, no statute is construed to have retrospective operation. The section, Mr. Seervai, submits can, therefore, only apply to the appointments done after the 2013 Act came into force, i.e. only to all the appointments of Managing Directors effected after 1st April 2014. Statutory retrospectivity can never be left to a matter of presumption; it must be clearly stated.² In the Affidavit in Reply, he also submits that a bar, such as the one Mr. Mylsamy's commends, can never be presumed where there are vested rights in place.

8. In the context of the latter, a recent decision of the Supreme Court in *P. Suseela & Ors. v University Grants Commission & Ors.*³ is most instructive. The Court drew a distinction between the impact of a statute on existing rights as against its impact on vested rights. Citing the five-judge bench decision of the Supreme Court in *Trimbak Damodhar Raipurkar Vs. Assaram Hiranman Patil and Others*, AIR 1966 SC 1758 : (1962) 1 SCR 700 Supp the Supreme Court said:⁴

14. The other interesting argument made is that such Regulations should not be given retrospective effect so as to prejudicially affect the interests of any person to whom such Regulation may be applicable. In order to appreciate this contention, it is necessary to distinguish between an existing right and a vested right. This distinction was made with great felicity in *Trimbak Damodhar Raipurkar Vs. Assaram Hiranman Patil and Others*, AIR 1966 SC 1758 : (1962) 1 SCR 700 Supp . In that case a question arose as to whether an amendment made to Section 5 of the Bombay Tenancy and Agricultural Lands Amendment Act could be said to be retrospective because its operation took within its sweep existing rights. A bench of five Hon'ble Judges of this Court held that Section 5 had no retrospective operation. This Court held:

.....

In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. As observed by Buckley, L.J. in *West v. Gwynne* [(1911) 2 Ch 1 at pp 11, 12] retrospective operation is one matter and interference with existing rights is another. "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law." These observations were made in dealing with the question as to the retrospective construction of Section 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). In substance Section 3 provided that in all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or

disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent. It was held that the provisions of the said section applied to all leases whether executed before or after the commencement of the Act; and, according to Buckley, L.J., this construction did not make the Act retrospective in operation; it merely affected in future existing rights under all leases whether executed before or after the date of the Act. The position in regard to the operation of Section 5(1) of the amending Act with which we are concerned appears to us to be substantially similar.

A similar question had been raised for the decision of this Court in *Jivabhai Purshottam v. Chhagan Karson* [Civil Appeal No. 153 of 1958 decided on 27-3-1961] in regard to the retrospective operation of Section 34(2)(a) of the said amending Act 33 of 1952 and this Court has approved of the decision of the Full Bench of the Bombay High Court on that point in *Durlabbhai Fakirbhai v. Jhaverbhai Bhikabhai* [(1956) 58 BLR 85]. It was held in *Durlabbhai* case [(1956) 58 BLR 85] that the relevant provision of the amending Act would apply to all proceedings where the period of notice had expired after the amending Act had come into force and that the effect of the amending Act was no more than this that it imposed a new and additional limitation on the right of the landlord to obtain possession from his tenant. It was observed in that judgment that "a notice Under Section 34(1) is merely a declaration to the tenant of the intention of the landlord to terminate the tenancy; but it is always open to the landlord not to carry out his intention. Therefore, for the application of the restriction Under Sub-section 2(a) on the right of the landlord to terminate the tenancy, the crucial date is not the date of notice but the date on which the right to terminate matures; that is the date on which the tenancy stands terminated.

15. Similar is the case on facts here. A vested right would arise only if any of the Appellants before us had actually been appointed to the post of Lecturer/Assistant Professors. Till that date, there is no vested right in any of the Appellants. At the highest, the Appellants could only contend that they have a right to be considered for the post of Lecturer/Assistant Professor. This right is always subject to minimum eligibility conditions, and till such time as the Appellants are appointed, different conditions may be laid down at different times. Merely because an additional eligibility condition in the form of a NET test is laid down, it does not mean that any vested right of the Appellants is affected, nor does it mean that the Regulation laying down such minimum eligibility condition would be retrospective in operation. Such condition would only be prospective as it would apply only at the stage of appointment. It is clear, therefore, that the contentions of the private Appellants before us must fail.

(Emphasis supplied)

9. I believe the present case fits the alternative scenario described in paragraph

15 of P. Suseela. The 2nd Defendant was already the Chairman and Managing Director of the 1st Defendant when he turned 70. The 2013 Act cannot, I think, operate as an immediate termination of his appointment. That would mean dating the operation of the 2013 Act back to the date of his appointment in 2012, i.e., giving it a retrospectivity. That is not possible, and to that extent Mr. Seervai is correct.

10. However, in the Affidavit in Reply, the 2nd Defendant provides an illustration: a situation where a person is appointed on 2nd April 2014 at a time when he is 68 years old. Mr. Seervai submits that in that situation, two years later, the person in question would cease to be the Managing Director on account of the provisions of Section 196(3)(a) of the 2013 Act.

11. On a closer reading of Section, I am unable to agree with this formulation. It seems to me that the matter turns on an interpretation of the word "'continue'" in Section 196(3) of the 2013 Act. This word seems to have been carried over from the earlier Section 267 of the 1956 Act, as have sub-sections 3(b), 3(c) and 3(d), equivalent to Section 267(a), (b) and (c). The 2013 Act also use the identical expression "'continue'". What is it that the proviso tells us? Is the age of 70 an absolute bar? That is not even Mr. Mylsamy's suggestion. A public limited company may well appoint a person of 80 years of age as a Managing Director; all that is needed is a special resolution. That is what the proviso plainly says.

12. In fact, it is the proviso that perhaps yields a clue to how the word "'continue'" should be interpreted in Section 196(3)(a). No special resolution can ever be required to "'continue'" an appointment. A special resolution is only ever required for an appointment or a reappointment. This is entirely distinct from the three situations contemplated under Section 267 of the 1956 Act, the same as those in sub-section 196(3)(b), (c) and (d) of the 2013 Act. Those provided for eventualities that must result in an instantaneous cessation of Managing Directorship. If a person, appointed as a Managing Director, Whole Time Director or Manager, is an undischarged insolvent, or is so adjudged; or if he suspends payment to or makes a composition with his creditors; or is convicted of an offence involving moral turpitude, he cannot be allowed to occupy that position for a minute longer. Evidently, none of these three situations could ever admit of an exception by means of a proviso or otherwise. That person cannot, in those situations, be allowed to "'continue'"; and there can be no exception to this. This is very different from an age bar. That can always be relaxed subject to certain conditions. This is precisely what the proviso to Section 196(3)(a) does. It, therefore, operates very differently from the other sub-sections of Section 196(3).

13. Does Mr. Mylsamy's interpretation withstand testing against various alternative scenarios, some that lie perhaps at the extremities? Take, for instance, a case where X is appointed Managing Director on 31st March 2014 for five years; he turns 70 the next day. Can Section 196(3) operate in such a

situation, to stop his tenure before it has even started? I would venture not; yet this is precisely the effect of Mr. Mylsamy's submission. Or take another case, where X is appointed for five years before 1st April 2014, but turns 70 just one day before that five-year term ends. Is it reasonable to expect a special resolution to validate his continuance for one day? A third scenario, perhaps, is where the five-year-term ends on 2nd April 2014 and the Managing Director turns 70 on 1st April 2014. Is his tenure to suffer this kind of tail-end decapitation? To what purpose? There is no discernible legislative intent or public purpose that can possibly be said to be achieved by any such interpretation; and too slavish an adherence to the cold letter of the statute without allowance for context is to my mind not just impermissible; it actually defeats the avowed statutory intent. After all, the proviso only adds a further check or balance: it demands a justification in the form of a special resolution for the appointment of a person over 70. It is hardly plausible to suggest that on turning 70 surely an occasion for celebration and, barring the unfortunate, a physiological inevitability a Managing Director, only for that reason, should find himself keeping the company of insolvents, fraudsters and the morally discombobulated.⁵ If a person even a decade older can be entrusted with the collective national destiny of over a billion people.

14. Finally: the age bar is in itself not new. Section 269 of the 1956 contained a parallel provision, though it seems to have operated somewhat differently. The relevant part, Section 269(2) said:

Appointment of managing or whole-time director or manager to require Government approval only in certain cases.

(1)...

(2) On and from the commencement of the Companies (Amendment) Act, 1988, no appointment of a person as a managing or whole-time director or a manager in a public company or a private company which is a subsidiary of a public company shall be made except with the approval of the Central Government unless such appointment is made in accordance with the conditions specified in Parts I and II of Schedule XIII (the said Parts being subject to the provisions of Part III of that Schedule) and a return in the prescribed form is filed within ninety days from the date of such appointment.

(Emphasis supplied)

15. The relevant part of Schedule XIII of the 1956 Act said this:

SCHEDULE XIII

[See sections 198, 269, 310 and 311]

CONDITIONS TO BE FULFILLED FOR THE APPOINTMENT OF A MANAGING OR WHOLE-TIME DIRECTOR OR A MANAGER WITHOUT THE APPROVAL OF THE CENTRAL GOVERNMENT

PART I

APPOINTMENTS

No person shall be eligible for appointment as a managing or whole-time director or a manager (hereinafter referred to as managerial person) of a company unless he satisfies the following conditions, namely:-

(a)...

(b)...

(c) he has completed the age of twenty-five years and has not attained the age of 70 years

Provided that where-

(i) he has not completed the age of 25 years, but has attained the age of majority; or

(ii) he has attained the age of 70 years; and

where his appointment is approved by a special resolution passed by the company in general meeting, no further approval of the Central Government shall be necessary for such appointment.

16. Clearly, there was no ""discontinuance"" of Managing Directorship at the age of 70; the section applied only to his appointment (and that includes his reappointment). Sections 269(2) and 267 of the 1956 Act are now sought to be merged in Section 196(3), and also further modified (to eliminate the previous regime of Central Government approval). This tells us that the age of 70 was never an automatic mid-stream disqualification even under the 1956 Act. It only required a certain precautionary measure at the commencement of the term, i.e., at the time of appointment (or reappointment), i.e., a special resolution. There is nothing to suggest that the rationale behind this has in any way changed in the 2013 Act. It is not possible, in my view, to accept Mr. Mysamy's construct that with the advent of the 2013 Act, every Managing Director at age 70 must, as it were, step off the bus.

17. Indeed, Mr. Mysamy himself agrees that the age limit is not a disqualification in and of itself. It only demands a special resolution. Since the Managing Director's 70th birthday is known from the day he joins the company, it is entirely possible for a general meeting to be called and that special resolution to be passed in such a way and at such a time that there is no unseating of the Managing Director at all. In other words, a company may well order its affairs to give its Managing Director an advance pass to remain aboard the bus, or to ensure that if he is forced to alight one evening, he is allowed to board the bus again the very next morning. To do any of this would be as permissible as it is entirely unnecessary and meaningless, and I do not believe that any statute should be read in a manner that results in so pointlessly pedantic a result. All of

this militates against the interpretation canvassed by Mr. Mylsamy.

18. The only conclusion that one can draw is that the word ""continue"" is correctly used in its strict sense in relation to clauses (b), (c) and (d) of Section 196(3), i.e., as a cessation eo instante on the occurrence of any of the events those sub-clauses contemplate, but in the context of Section 196(3)(a), it means, and can only mean ""appointment"" and ""reappointment"".

19. Correctly read, therefore, Section 196(3) does not operate to interrupt the appointment of any Director made prior to the coming into force of the 2013 Act, even in a case where the Managing Director crosses the age of 70 years during the term of his appointment; and it also does not interrupt the appointment of a Managing Director appointed after 1st April 2014 where at the date of such appointment or re-appointment the Managing Director was below the age of 70 years but crossed that age during his tenure. There is no mid-tenure cessation of Managing Directorship as a result of Section 196(3)(a). All that Section 196(3) (a) does is to sound a note of caution in the public interest and to demand from the company a special resolution when a person who has already crossed the age of 70 at the date is proposed to be appointed or re-appointed. The word ""continue"", therefore, must be read contextually.

20. It is not possible to grant the Plaintiff the interim relief that he seeks. The Notice of Motion is dismissed. There will be no order as to costs.

1 Nasiruddin and Others Vs. Sita Ram Agarwal, AIR 2003 SC 1543 : (2003) 4 CTC 284 : (2003) 2 JT 56 : (2003) 1 SCALE 658 : (2003) 2 SCC 577 : (2003) 1 SCR 634 : (2003) 2 UJ 781 : (2003) AIRSCW 1474 : (2003) AIRSCW 908 : (2003) 2 Supreme 472 : (2003) 2 Supreme 50 ; Ajay Pradhan Vs. State of Madhya Pradesh and Others, AIR 1988 SC 1875 : (1988) 3 JT 295 : (1988) 2 SCALE 532 : (1988) 4 SCC 514 : (1988) 2 SCR 281 Supp : (1988) 2 UJ 485 2 Gulab Chand Vs. Kudilal and Another, AIR 1958 SC 554 : (1959) 1 SCR 313 3 P. Suseela and Others Vs. University Grants Commission and Others(2015) 2 ESC 201 : (2015) LabIC 2251 : (2015) 3 SCALE 726 : (2015) 2 SCT 580 4 5 All this apart from the sheer incongruity represented by the irresistible comparison with prominent persons, past and present, in public life in this country.