(1986) 07 DEL CK 0016

In the Delhi High Court

Case No : Civil Writ Petition No. 229 of 1983

Stup Consultants Ltd. APPELLANT

Vs

Union of India and Another RESPONDENT

Date of Decision : 09-07-1986

Acts Referred:

Citation : (1987) 61 CompCas 784 : (1986) ILR Delhi 519

Hon'ble Judges : Mahinder Narain, J

Bench : Single Bench

Advocate : S. Rao, Anil Kumar and S.P. Sharma, for the Appellant;

Judgement

Mahinder Narain, J.

(1) The petitioner company has filed this writ petition as the Central Government by its letter dated 14th January, 1983, Annexure ''K'' to the writ petition, has not- given an expression of opinion regarding the professional status of Shri C. R. Alimchandani, who was appointed as its Senior Chief Consultant, by a Resolution dated 20-7-1982 in its General Meeting.

(2) It is stated in the writ petition that Shri C. R. Alimchandani is one of the "Outstanding Professionals in the field of Structural Design" and diverse applications of pre-stressed Concrete Technology This is stated in paragraph No. 6 of the Petition which reads as under:-

"6.Shri C. R. Alimchandani holds the technical post of Senior Chief Consultant- and has attained the lop-most level on the technical side of the company by dint of professional merit acquired by him ever since his graduation in Civil Engineering from Poona University, at the age of 22, in 1957 ranking first in the University. He proceeded to France under a French Government Scholarship for advanced studies and training in pre-stressed design construction and secured the D.C.T. He was awarded the Actim Medal for the most outstanding professional among 35,000 renowned experts trained by Actim (French Government Agency) over a period of 20 years. He is a recognised expert on a structural design and diverse applications of pre-stressed concrete. He is Editor of the Stup Bulletin of Information, a quarterly journal priced at Rs. 6.00 per issue which enjoys a considerable circulation in the professional circles concerned with Civil Engineering. He has been the Vice-President from India of the Federation International de law pre constraints (F.LP.) and as such Vice-President brought out a report to the 9th International F.I.P. Congress, Stockholm, 1982, a report which has been published by Institution of Engineers (.India). The said report contains not only his forward as Vice-President of F.I.P. from India, but also contains an article by him and another professional named Shri P. C. Bhasal and Shri N. V. Merani belonging to the Government of India and Government of Maharashtra respectively as engineers of experience and this article contains reference to some of the projects undertaken by the company. A copy of the said report will be referred to and relied upon by the petitioner at the hearing as may be required by the Hon''ble Court. The standing of Shri Alimchandani in the profession of Civil Engineering is further evident from the lectures delivered by him on 30th November, 1973 at the Bengal Centre of the Institution of Engineers (India) at Calcutta, styled the Institution of Structural Engineers (London) Lecture for the year 1973. He has also distinguished himself as the author of several articles on the subject in which he has specialised for a whole life-time so far. A complete charge of the Senior Technical personnel of the company in charge of various projects in which the company is interested for the designs sponsored by it and for removing technical impediments in the execution of the said project is annexed hereto and marked Annexure ''D'' The said charge includes all the Directors of the Company we of whom only happens to be an Advocate. These senior persons guide and direct other technical personnel with engineering qualifications working under them in several teams and the technical personnel as a whole numbering about 250 as aforesaid give validity and justification to the name by which the company is known, namely Stup Consultants Limited. Shri C. R. Alimchandani is in overall charge of the work of the various teams of experts who constitute, as it were, the soul-force of the company and Shri Alimchandani constitutes the moving spirit of the company in this respect. His primary role consists in this respect and for the professional services involved in this role, he takes remuneration from the company, the services being rendered'' to the clients of the company rather than the company itself as for any project that it owns. Shri Alimchandani is also expected by the company to continue as Chairman and Managing Director of the company with no additional remuneration vide letter of the company to Shri Alimchandani dated 25th June, 1982. A copy of the said letter is annexed hereto and marked as Annexure"E''. The capacity of Managing Director is a capacity distinct and different from Shri Alimchandani''s capacity as Senior Chief Consultant of the Company. As Managing Director of the company, he is concerned with matters of the several kinds which are essentially of organisational nature as described already in paragraph 4 above. These matters also involve their own peculiar responsibility but in view of the professional services by which he is able to fulfill himself in relation to various clients of the company, he is content to be an honorary Managing Director as resolved by the company. The copies of the resolutions passed by the company in General Meeting in respect of the two capacities of Shri Alimchandani as Managing Director and as Senior Chief Consultant on the same date, namely 20th July, 1982 are annexed hereto and marked as Annexure ''F'' and ''G'' respectively".

(3) In the Counter Affidavit that has been filed there is no exception taken to the assertions in para 6 of the writ petition that Shri C. R. Alimchandani is one of the "outstanding professionals". Reply to paragraph (6) is common with other paragraphs of the writ petition namely paras 1 to 6 and reads as under:-

"1-6.Paras I to 6 of the petition filed by the petitioner are matter of record and need no comments."

In view of this reply it is apparent that the Union of India does not contest the assertion that Shri C. R. Alimchandani is a professional.

(4) The refusal of .the Central Government which is subject matter of this writ petition is dated l4th January, 1983 and the communications to the petitioner is annexed as Annexure ''K'' to the writ petition. The same reads as under :-

"WITH reference to your letter No. Accts/553/NVRl KVK/885, dated 18th December, 1982 on the above subject, I am directed to say that after careful reconsideration of the matter, the Central Government is still of the opinion that Shri C. R. Alimchandani is - to be appointed as Managing Director and the remuneration allowed to him will be in that capacity. The question of expression of opinion in his favor, Therefore, does not arise. You are, Therefore, advised to please make a formal application under sections 269 and 309 of the Companies Act, 1956. It may also please be noted that without prior approval of the Central Government the continuance of Managing Director will not be in accordance with the Law and remuneration if any, paid-to him in any capacity will be recoverable u/s 309(5A) of the Companies Act, 1956."

(5) The relevant provision which needs to be examined is Section 309 of the Companies Act which reads as under :-

"S.309.Remuneration of directors.-(1) The remuneration payable to_ the directors of the company, including any managing or whole time director shall be determined, in accordance with and subject to the provisions of section 198 and this section, either by the articles of the company, or by a resolution or, if the article so require, by a special resolution, passed by the company in general meeting and the remuneration payable to any such director determined as aforesaid shall be inclusive of the remuneration payable to such director for services rendered by him in any other capacity : Provided that any remuneration for services rendered by any such director in any other capacity shall not be so included if:- (a) the services rendered are of a professional nature, and (b) in the opinion of the Central Government, the director possesses the requisite qualifications for the practice of the profession. (2) A director may receive remuneration by way of a fee for each meeting of the Board, or a committee thereof, attended by him: Provided that where immediately before the commencement of the Companies (Amendment) Act, 1960, fees for meetings of the Board and any committee thereof, attended by a director are paid on a monthly basis, such fees may continue to be paid on that basis for a period of two years after such commencement of for the remainder of the term of office of such director, whichever is less but no longer. (3) A director who is either in the whole-time employment of the company or a managing director may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other: Provided that except with the approval of the Central Government such remuneration shall not exceed five per cent of the net profits for one such director, and if there is more than one such director, tea per cent for all of them together. (4) A director who is neither in the whole-rime employment of the company nor a managing Director may be paid remuneration- either (a) by way of a monthly, quarterly or annual payment with the approval of the Central Government ; Or (b) by way of commissioning if the company by special resolution authorises such payment Provided that the remuneration paid to such director, to all of them together, shall not exceed.- (i) one per cent, of the net profits of the company, if the company has a managing or whole- time director or a manager; (ii) three per cent of the net profits of the company, in any other case: Provided further that the company in general meeting may, with the approval of the Central Government, authorises the payment of such remuneration at a rate exceeding one percent or, as the case may be three per cent of its net profits. (5) The net profits referred to in sub-sections (3) & (4) shall be computed in the manner referred to in section 198, sub-section (1) (5-A). If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government where it is required, he shall, refund such sums to the company and until such sum is refunded, hold it in trust for the company. (5-B) The company shall not waive the recovery of any sum refundable to it under sub-section (5-A) unless permitted by the Central Government. (6) No director of a company who is in receipt of any commission from the company and who is either in the whole-time employment of the company or a managing director shall be entitled to receive any commission or other remuneration from any subsidiary of such company. (7) The special resolution referred to in sub-section (4) shall not remain in force for a period of more than five years; but may be renewed, from time to time, by special resolution for further periods of not more than five years at a time: Provided that no renewal shall be effected earlier than one year from the date on which it is to come into force. (8) The provisions of this section shall come into force immediately on the commencement of this Act or, where such commencement does not coincide with the end of a financial year of the company, with effect from the expiry of the financial year immediately succeeding such commencement. (9) The provisions of this section shall not apply to a private company unless it is a subsidiary of a public company."

(6) The perusal of the above provision shows that section 309 is meant to control remuneration of managing directors or whole time directors of any company. It is also clear that proviso to section 309(1) excludes certain remuneration which are received by the directors covered by section 309. if the conditions in provisos (a) and (b) are satisfied when the remuneration receivable is not covered by the provisions of section 309. 6(a). Proviso (a) to section 309 postulates that if the services for which the director is remunerated is of a professional nature, and if in the opinion of the Central Government the director possesses the requisite qualifications for the practice of the profession then payments made or remuneration given for rendering of such professional services does not need prior approval of the Central Government.

(7) In view of the statutory provisions of the proviso 309(1) any company can seek opinion of the Central Government regarding possession of requisite qualifications. This provision was invoked by the petitioner company. In their letter dated 3 0th September, 1982, Annexure ''H'' it was stated that:

"WE would request the Government for expression of such opinion in the case of C. R. Alimchandani. We may add that in the case of a traditional profession like the Engineering and in the case of an acknowledged expert in Civil Engineering line like Mr. C. R. Alimchandani, the expression of opinion may be a pure formality. But even so, we make the request out of a reference for a possible statutory requirement in this behalf".

(8) By another Resolution in General Meeting of the company Annexure ''G'' also dated 20th July, 1982 C. R. Alimchandani was reappointed as Managing Director of the company for a period of 5 years w.e.f. 1-1-1982 subject to the approval of the Central Government. C. R. Alimchandani was not to be paid any remunerations a Managing Director of the company, but in view of his appointment as Senior Chief Consultant it was resolved by the company in its General Meeting as follows:

"FURTHER resolved that in view of his appointment as Managing Director the remuneration payable to him as Sr. Chief Consultant of the company be and is hereby sanctioned as minimum remuneration to be paid to Mr. C. R. Alimchandani, as remuneration for his services as Sr. Chief Consultant, in case of loss or inadequacy of profit during the aforesaid period."

(9) The "loss or inadequacy of profit" mentioned in the resolution was for the purpose of section 198 of the Companies Act.

(10) Two resolutions have been passed by the petitioner company in .its General Meeting, one resolving that Shri C. R. Alimchandani be appointed as Senior Chief Consultant and the other reappointing him as Managing Director. Section 309 of the Companies Act itself postulates that there can be professionals rendering service to a company. The section in clear terms obviously contemplates that

Directors, Managing Directors, or whole time Directors shall be remunerated for being a Director, Managing Director, or whole time director of the company.

(11) It is axiomatic that what is not prohibited by law is permitted by law. Section 309 does not prohibit a director from rendering professional service. In fact, it postulates that a director may render professional service. The only condition which is placed on such persons being remunerated for professional services rendered to their company is that Central Government should opine as to whether such a person possess the requisite qualifications for the practice of the profession in question with respect to which the professional service is rendered by the Director.

(12) Neither in the Counter-affidavit nor in the impugned letter dated 14-1-1983 it is asserted by the respondents that C. R. Alimchandani does not have the requisite qualifications for the practice of the profession of a Civil Engineer, and specifically it is not asserted in the counter affidavit of that C. R. Alimchandani should not be appointed as Senior Chief Consultant for the reason that he did not have the requisite experience in the field of pre-stressed concrete design.

(13) It is not disputed by the respondents that section 309(1) enables a company to seek the opinion of the Central Government regarding possession of requisite qualifications, as the provision exists in the Companies Act. Upon the power being involved by a company it is necessary and incumbent upon the Central Government indeed it is its duty to express an opinion thereon. The Central Government, in my view, cannot side-track the issue by requiring compliance with another provision, or any other aspect of company law as a precondition to the expression of opinion by it. The Central Government in the instant case by the impugned order required moving of an application u/s 309 of the Companies Act for the purpose of getting approval of the Central Government with respect to re-appointment of Shri C. R. Alimchandani as a Managing Director of the Compny. The letter of the petitioner company dated 10th September, 1982 had also sought approval of the Central Government for the reappointment of C. R. Alimchandani as Managing Director. Merely because two decisions of the Central Government were required by the same document the same should not be inextricably linked together, and Therefore one could not be decided without the other.

(14) In facts of the case there was no dispute and that C. R. Alimchandani is a professional man. He holds degree in Civil Engineering from Poona University besides he has technical qualifications which are mentioned in paragraph 6, which as noted above, are not disputed. In this view of the matter there could have been no difficulty in the Central Government expressing its opinion, relating to the professional/ technical qualifications of C. R. Alimchandani. It is not disputed before me that C. R. Alimchandani is a Civil Engineer. Indeed, it is stated to be a "matter of record" in the counter affidavit and the fact could not be disputed. It would have been but fair for the Central Government to have expressed this .opinion in its communication dated 14-1-1984, as they have

done in the\\counter affidavit in this court.

(15) In this view of the matter whatever remuneration is receivable by C. R. Alimchandani as a Senior Chief Consultant of the petitioner company the same would be for services of professional nature rendered by him, as its senior Chief Consultant, to the petitioner company.

(16) It is urged by Mr. Sharma, who appears for the respondents before me that a perusal of the Resolution would show that what is being done is that C. R. Alimchandani is being paid a monthly salary of Rs. 5,5001- in the pay scale of Rs. 5,500-500-7,500. In this'' view of the matter, it is urged that C. R. Alimchandani is a whole time employee of the company and for this reason he can not be termed as a Senior Chief Consultant. inspire of my asking, the respondents have not placed before me any prohibition by a professional body like the Institution of Engineers which prevents persons holding traditional qualifications of Civil Engineer from being an employee, whether as a Consultant or otherwise. of any company or person. Indeed, I doubt whether such a prohibition could exist, or could be imposed upon by any Body like the Institution of Engineers, for the reasons That it is a common knowledge that the Government of India has its public works department which employs persons who hold professional qualifications as a Civil Engineers who are its whole time employees. There being no such prohibition against any person holding professional qualification of a Civil engineers from becoming an employee of any person, in my view, it is not material whether the consultation charges which are paid to a professional engineer are paid on a monthly basis, or on a case to case basis. Whatever may be the mode of payment to a professional Consultant what is paid to such person is his professional consultancy fee.

(17) In any case, I do not see any difficulty in bifurcating the two things which were required to be done by the Central Government, (1) expression of opinion as to whether Shri C. R. Alimchandani was a professional (which opinion was not expressed in the letter dated 14-1-1983 but was not disputed in the Counter-affidavit, nor was it disputed before me. and (2) approval of reappointment of C. R. Alimchandani as Managing Director. In the absence of such dispute I do not see any purpose being served for directing the respondents to formally communicating their no objection to the professional qualifications. The prayers in this writ petition in wide enough to include a declaration, in view of pleadings before me, that Shri C. R. Alimchandani does possess the requisite qualifications for the practice of the professional of Civil Engineering.

(18) The Memorandum of Association of the petitioner company which is filed as Annexure ''A'' refers to the objects for which the petitioner company was. established inter-alia to be "to Act as designers and Consultants in the designing of pre-stressed concrete structures and of products, either precase, pre-fabricated or cast-in-situ........................and construction work". This being the case Shri C. R. Alimchandani would be acting in accordance with the objects of the company in rendering the professional service as Consultant in designing a

pre-stressed concrete structure etc., and thus the company was entitled to the expression of opinion from the Central Government, and in view of this admission in the Counter affidavit this petition has to succeed.

(19) The counsel for the petitioner has cited Ruby Mills Ltd. & Another Vs. Union of India & Air. 57 C C 193and R. Gac Electronics Ltd. & Anr. Vs. Union of India & Others 52 C C 288 in support of this case. Both these judgments support the contentions of the petitioner company. In both these cases the persons who rendered professional services were Lawyers /solicitors. I do not see any difference between the "professional" services being rendered by a solicitor or a Lawyer and the ''''professional" services renders by a Civil Engineer, as Consultant of the company.

(20) I make it clear that whatever is stated herein above will not in any way affect the approval which is to be given or not to he-given by the Central Government with respect to an application made by the Company in connection with the re-appointment of Mr. C.R. Alimchandani as a Managing Director of the Company.

(21) Erring the course of the agreements reference was made to section 269 of the Companies Act,. 1956 regarding the approval to be given for appointment of any person as Managing Director. Because I am confining myself in the instant case to the expression of opinion regarding the professional qualifications the contention raised with respect to section 269 of the Companies Act are not being decided by me. As stated above, the respondents shall be entitled to proceed in accordance with law with regard thereto.

(22) In this view of the matter this writ petition succeeds. The order dated 14-1-1983 in so far as it relates to no expression of opinion regarding the professional qualifications of Shri Alimchandani is quashed, and it is declared that in view of the counter affidavit filed by the respondents, Shri C. R. Alimchandani has to be treated as a person who has requisite qualifications for practice of the profession of a Civil Engineer, and the petitioner is entitled to such opinion from the Central Government, which the respondent is directed to convey to the petitioner company within two months from today.

