

(1956) 08 MAD CK 0011
In the Madras High Court

The Public Prosecutor

APPELLANT

Vs

T.P. Kaithan, Director of Oakley Bowden and Co. Ltd. and
Others

RESPONDENT

Date of Decision : 22-08-1956

Acts Referred:

Companies Act, 1956 — Section 91B(1)

Citation : (1956) 69 LW 774 : (1956) 2 MLJ 590

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Single Bench

Judgement

Rajagopala Ayyangar, J.—These three appeals by the Public Prosecutor raise for consideration the proper interpretation of Section 91-B(1)

of the Indian Companies Act. The Magistrate before whom the accused in the several appeals were charged has held that there was no

contravention of the provisions of this section and has by his judgment dated 31st January, 1956, acquitted the accused. It is from this order of

acquittal that these appeals have been preferred. The learned Advocate-General appearing for the appellant urged that he desired to have a

considered decision on the construction of the provision I have mentioned above but as I was clearly of the opinion that the decision of the learned

Magistrate was correct, I did not think it necessary to issue notice to the accused u/s 422, Criminal Procedure Code.

2. The facts which have given rise to these proceedings are as follows : - Messrs. Oakley Bowden & Co. (Madras), Ltd., is a public company

registered under the Indian Companies Act. It is managed by the Board of three directors and under the Articles of the company the Board acts

either at meetings or by resolutions passed by circulation.

3. On 2nd June, 1953, the Board of Directors which then consisted of T.P. Kaithan, V.S. Krishnaswami and V.S. Bhassin passed by circulation

the following resolution:

Resolved that the Chartered Bank of India, Australia and China, Madras; the Imperial Bank of India, Madras; the National Bank, of India Limited,

Madras; the Indian Bank Limited, Madras; and the Eastern Bank Limited, Madras and Bombay, be and are hereby empowered, whether the

Company's account is in credit or overdrawn, to honour Cheques, Bills of exchange and Promissory notes, drawn, accepted or made on behalf of

the company, by anyone of the two gentlemen:

1. Sri T.P. Kaithan;

2. Sri V.S. Krishnaswami;

and act on any instructions and accept any receipts or other documents relating to the account transactions or affairs of the company, if so signed

on behalf of the company.

All the three directors including the two named in the resolution signed in the minutes in token of the resolution being passed. On 22nd February,

1954, this resolution dated 2nd June, 1953, was cancelled and instead of the two directors named in the earlier resolution, one A.N. Kaithan, who

was appointed to act on behalf of the company and on behalf of its managing agents, and was directed to operate on these accounts. By another

resolution passed by circulation on 22nd February, 1954, V.S. Krishnaswami was instructed to communicate A.N. Kaithan's appointment to the

respective banks. I need only mention that the resolution of 22nd February, 1954, which was also passed by circulation was signed by T.P.

Kaithan and V.S. Krishnaswami.

4. The Registrar of Joint Stock Companies filed the prosecutions C.C. No. 11913 to 11915 of 1955 complaining that the resolution dated 2nd

June, 1953 and the two resolutions dated 22nd February, 1954, were in contravention of Section 91-B(1) of the Indian Companies Act bringing

the concerned directors T.P. Khaithan and V.S. Krishnaswami within the mischief of Section 91-B(2). The resolution dated 2nd June, 1953, was

the subject of complaint in C.C. No. 11913 of 1955 from which Criminal Appeal No. 307 of 1956 has been filed while the resolution dated 22nd

February, 1954, cancelling the resolution dated 2nd June, 1953, formed the basis of the complaint in C.C. No. 11914 from which the Criminal

Appeal No. 308 of 1956 arises and the resolution authorising V.S. Krishnaswami to communicate the resolution dated 22nd February, 1954 to

the Banks was the subject of complaint in C.C. No. 11915 of 1955 which has led to Criminal Appeal No. 309 of 1956. T.P. Kaithan and

Krishnaswami are the accused in C.C. Nos. 11913 and 11915 of 1955 while V.S. Krishnaswami who was instructed to communicate the

resolution dated 22nd February, 1954 to the banks is the sole accused in C.C. No. 11914 of 1955.

5. Section 91-B which is said to have been contravened by the accused in the present case runs:

91-B (1). No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested

nor shall his presence count for the purpose of forming a quorum at the time of any such vote; and if he does so vote, his vote shall not be counted.

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may

suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of Sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) This section shall not apply to a private company.

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements

made on behalf of the subsidiary company with any person other than the holding company.

6. The basis of the prosecution was that the accused as directors voted on a contract or arrangement in which he or they was or were either

directly or indirectly concerned or interested and that they had thereby contravened the provisions of Sub-section (1) so as to bring them within the

penal consequence enacted by Sub-section (2). Before dealing with the meaning of the expression ""contract or arrangement in which he is either

directly or indirectly concerned or interested"" in Sub-section (1), it might be useful to refer to the terms of Section 91-A which also refers to ""an

interest on the part of the directors in a contract or arrangement with the

company"":

91-A (1). Every director who is directly or indirectly concerned or interested in any contractor arrangement entered into by or on behalf of the

company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined en, if his interest

then exists or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement.

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm and is to be

regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within

the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction

with such firm or company.

2. Every director who contravenes the provisions of Sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

3. A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which Sub-section (1) applies,

and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

4. Every Officer of the company who knowingly and wilfully acts in contravention of the provision, of Sub-section (3) shall be liable to a fine not

exceeding five hundred rupees.

It must be clear from the collocation of the two sections that the contract or arrangement dealt with in the two provisions must be identical. While

Section 91-A enjoins an obligation on the director who is interested in a contract or arrangement entered into by the company to disclose his

interest to the other directors and imposes penalties for not disclosing his interests, Section 91-B is designed to prevent such interested director

from voting on these resolutions.

7. Thus the nature of the contract or arrangement as well as the nature of the concern or interest of the director dealt with in Section 91-B must

both be obviously of the same nature as that envisaged by the identical words in Section 91-A. So far as the latter section is concerned it does not

need much argument to establish that it is designed to ensure that a director

who is in a fiduciary position to the company does not make any secret profit on account of the transactions or business of the company while acting on its behalf. As was stated in *North-west Transportation Co. v.*

Beatty (1887) L.R. 12 A.C. 589,

a director is precluded from dealing on behalf of the company with himself entering into engagements in which he has a personal interest conflicting

or which possibly makes conflicts with the interests of those whom he is bound by fiduciary duties to protect and this rule is as applicable to the

case of one of several directors as to a managing or a sole director.

The object of the statutory provision in Section 91-A was to secure that there shall be no conflict between the personal interest of each of the

directors and their duty towards the company without the nature of that interest being disclosed to the directors and the shareholders. When there

is a possibility of such a conflict, by a director having personal interest in any contract or arrangement entered into by the company, Section 91-A

provides for its disclosure to the other directors so that the company would have the advantage of the unbiased and informed judgment of the other

directors as to whether in the interests of the company such a transaction need be entered into or not. Sub-section (3) of Section 91-A, which was

introduced by the Companies Amendment Act, 1936, makes provision for this information becoming, available to shareholders by requiring this

matter to be entered in a register, so that even they might be kept informed of the personal interest of the directors in any contract entered into on

behalf of the company. Thus the general rule of law that directors shall not make a profit out of the contracts by the company without the

knowledge of the co-directors and the shareholders is statutorily enforced and if there is a violation besides the Common Law obligation to

account to the company for these profits, there is a penalty super-imposed by Section 91-A(2).

8. In the case of the resolutions now said to be contraventions of Section 91-B(1) it is not the case of the prosecution that these resolutions

involved any contract in which the accused-directors were directly or indirectly concerned or interested but their case was that they involved an

arrangement in which there was such concern or interest. I am clearly of the opinion that the prosecution was misconceived and that the resolutions

do not fall u/s 91-B(1) at all but are merely acts of delegation in the normal course of the management of the company.

9. The main provisions of Sections 91-A and 91-B which were introduced by an Amending Act XI of 1914 have had a previous history. By

Section 29 of the Companies Clauses Act 7 and 8, Vict. Ch. no directors of the companies included in that enactment were precluded from voting

or acting as directors on the subject of any contract proposed to be made by or on behalf of the company in which they were interested and any

contract with certain exceptions in which any director was interested was of no effect until confirmed by the share-holders at the next or general

meeting. The decisions rendered on Section 29 of the Companies Clause Act, 1845, are collected by Lindley in his treatise ""on Companies"" (6th

Edition) Vol. 1, at page 450, note (y). An examination of these would show that the arrangement hit at by the provision was one in which the

director had a personal interest conflicting with his duties towards the company and not one which merely provided for his management of the

company.

10. There was no statutory provision corresponding to this Section 29 in the English Companies Act of 1862. In equity, however, the same

principle, namely, that a transaction in which a director purporting to act on behalf of the company has in fact been dealing with himself as an

individual could not stand if his interest conflicted with that of the company applied to the cases of companies incorporated under the English

Companies Act, 1862. The same principle was however not recognised at law. But this ceased to be of any consequence after the Judicature Act,

1875. The principle of this statutory provision was, though somewhat inadequately, sought to be achieved by provisions in the articles of the

several of the companies registered under the earlier English Companies Acts; particularly as the Rules of the Stock Exchange, London, required

that in the case of a company requiring a quotation, the Articles must provide that a director shall not vote on any contract in which he is interested

and that if he does so, his vote shall not be counted. In the English Companies Act, 1948, Section 199 which re-enacted Section 149 of the

Companies Act, 1929, provides:

It shall be the duty of a director of a company who is in any way directly or

indirectly interested in a contract or a proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.

and directors who failed to comply with the provisions of the section were made liable to a fine of not exceeding ₹100. In line with this Article

84 of Table A provides:

A director who is in any way directly or indirectly interested in a contract or a proposed contract to the company shall declare the nature of his

interest at a meeting of the directors in accordance with Section 199.

(2) A director shall not vote in respect of any contract or arrangement in which he is interested and if he shall do so, his vote shall not be counted;

nor shall he be counted in the quorum present at the meeting but neither of these prohibitions shall apply to (then follows the description of the

arrangements not relevant to the present context).

11. These provisions have to be read in the light of the fundamental principle of Company Law that the directors are the body entrusted with the

task of carrying on the business of the company. This is provided for by Article 71 of the Indian Companies Act which is deemed to be the part of

the article of every company u/s 17(2) of the Act. Though the directors as a body are responsible to the shareholders for the conduct of the

company's business, it is undoubted law that they could delegate their powers to one or more of themselves for the purpose of carrying it on more

conveniently. Thus in the present case if the resolutions which are now charged as offences were not passed, the result would only be that the bank

account would have to be opened in the names of all the directors and to be operated by all of them. If this had been done by a resolution it could

not be said that by opening the account in the bank in their names the directors had violated either Section 91-A or 91-B for if this constituted a

violation of Section 91-A or 91-B, it would be apparent that the company cannot open a banking account at all which would show the absurdity of

that position. If a resolution of the Board of Directors authorising that body to open a banking account and each one of the directors to operate on

the account so opened is not a contravention of Section 91-A or 91-B it will be so because the directors are not personally interested in the

management as distinct from their interest in it as directors of the company. If

the interests of the directors as such were to be hit at by the sections, the management of companies by the Board of Directors would become impossible and the work of every company would be at a standstill. If it is borne in mind that the purpose of the sections is the avoidance of conflicts between duty and interest it would be apparent that the carrying on of the business of the company for which the directors are appointed cannot give rise to that conflict. Peterson, J., had to consider a similar question in *Foster v. Foster* (1916) 1 K.B. 532. Article 93 of a company provided that a director might contract with the company but prohibited a director from voting in respect of any contract in which he was interested and under Article 99 the directors "may from time to time appoint any one or more of their body to be managing director of directors, for such period, at such remuneration, and upon such terms as the directors think fit". One Mrs. Foster who was one of the Board of Directors was appointed as chairman and joint managing director of the company without remuneration. The resolution appointing her to this office was passed at a meeting of the Board at which she was present and in which she voted and the validity of those appointments were challenged on the ground of contravention of Article 93. Peterson, J., rejected this contention by saying:

...the appointment by the directors of one of their body as chairman, or the appointment by the directors of one of their number as a managing director, without more, is not a contract within Article 93, but is merely a delegation of their powers and is very similar to the power which they possess to appoint committees of themselves and delegate their powers to those committees. In my judgment, therefore, the appointments in question were not contracts within Article 93, and therefore Mrs. Foster was not disabled from voting in support of the resolution.

Illustrations of a similar construction of statutes designed for like purpose as Sections 91-A and 91-B of the Indian Companies Act are numerous and I would refer only to two of them. *Nutton v. Wilson* (1889) L.R. 22 Q.B.D. 744, was concerned with the construction of Rule 64, Schedule II of the Public Health Act, 1875 which provided that a member of a local board who was in any manner concerned in any bargain or contract entered into by such board shall cease to be such member and his office as such shall thereupon become vacant and Rule 70 imposed a penalty on

a person ""who acts as such member when disabled from acting by any provision of the Act"". A.L. Smith, J., imposed on a defendant who was a

member of a local board penalties under Rule 70 for being concerned in a contract with another person whose contract with the board had been

accepted on a resolution moved by the defendant. The Court of appeal dismissed the defendant's appeal and Lindley, L.J., after pointing out that

the expression ""in any manner concerned"" was of fairly wide import said:

To interpret words of this kind, which have no very definite meaning and which perhaps were purposely employed for that very reason, we must

look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise.

Lopes, J., said:

It seems to me that if we held the contrary, it would be letting in the very mischief which the Act intended to prevent, and subjecting the members

of local boards to the class of temptations which it was intended to remove.

Barnacle v. Clark (1900) Q.B. 279, arose u/s 34 of the Elementary Education Act, 1870, which provided that a member of a school board who

shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board

was liable to a penalty and his office became vacant. The respondent, a member of a school board, sold sand and gravel to a builder who had

entered into a contract with the board for the building of a school knowing at the time of his sale that these materials were intended to be used in

the building of the school. Ridley and Darling, JJ., held that the respondent had contravened the provisions. The learned Judges referred to Nutton

v. Wilson (1889) L.R. 22 Q.B.D. 744, and stated that these provisions were intended to ensure that members of public bodies:

shall be free from any suspicion of deriving profit, directly or indirectly, by reason of the position they hold.

12. If this was the object of the enactment, it follows that the mere carrying out the duties of a director would not amount to ""being concerned in

any contract or arrangement"" within Section 91-A or 91-B of the Indian Companies Act. In this connection I will only repeat that the expression

interest in an arrangement"", though some-what elastic, must in the context receive the interpretation that it must be of such a nature as to involve a

conflict between interest and duty of the same type as would arise in the case of personal interest in the contracts of the company. In both these

situations, what is aimed at is the avoidance of a director who has a personal interest in a transaction of the company from getting the board of

directors to agree to it without informing the co-directors of his interest and by taking part in the voting.

13. It is this conflict between the personal or self interest of the director and his duty to the company to render independent and unbiased advice,

that is the mischief, which these provisions are intended to remedy. Viewed thus it would be clear that in the present case the resolutions of the

board constitute but a delegation of the power of the board to certain of their members and there is no element of personal interest involved in it so

as to give room for any conflict between interest and duty; and therefore no violation of Section 91-B.

14. The order of the Magistrate acquitting the accused in these three prosecutions are therefore correct and the appeals are rejected u/s 421,

Criminal Procedure Code.