Privy Council Appeal No. 23 of 1948

Ram Kissendas Dhanuka and others - - - - - - *Appellants*

v.

Satya Charan Law and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 15TH DECEMBER, 1949

Present at the Hearing :

LORD GREENE
LORD MACDERMOTT
SIR MADHAVAN NAIR

[*Delivered by* LORD GREENE]

This is an appeal from a judgment and decree of the High Court at Fort William affirming on appeal a judgment and decree of the same Court in its original jurisdiction. The questions raised in the litigation relate to the validity of two resolutions of the respondent company Lothian Jute Mills Ltd. (hereinafter called " the Company "). By the first of these resolutions (which were passed at a requisitioned general meeting of the Company held on the 3rd June, 1945), the appellants (other than S. P. Bose, who was one of the requisitionists), seven in number, were appointed to be directors of the Company in addition to the four existing directors, one of whom was the respondent Dr. Satya Charan Law. By the second resolution it was resolved that the termination of the appointment of the managing agents of the Company, Messrs. Andrew Yule and Co. Ltd. was to be recorded and in any event that they were thereby forthwith removed from their office. In the action the respondent Dr. Law on behalf of himself and all other holders of shares in the Company attacked the validity of both resolutions and sought appropriate relief. The defendants were the eight appellants and the respondent H.H. Commanding General Hiranya Shamsher Jung Bahadur Rana, another of the requisitionists, who has taken no part in the proceedings. The ground on which the validity of both resolutions was attacked was that under the articles of association of the Company they could only have been passed effectively as to No. 1 by a special and as to No. 2 by an extraordinary resolution whereas the majority by which they purported to be passed was admittedly insufficient for those purposes; and that the rights of the minority had been illegally infringed accordingly. At the trial McNair J. held that both resolutions were invalid; he made declarations to that effect and granted consequential injunctions. This decision was affirmed on appeal by a Court consisting of Derbyshire C.J. and Gentle J.

The question as to the validity of resolution No. 1 depends upon the true construction of certain of the articles of association of the Company. These so far as relevant are as follows :

" DIRECTORS.

109. The number of the Directors shall not be less than three nor more than four. . . .

* * * * *

111. The Directors shall have power at any time and from time to time to appoint any person, other than a person who has been removed from the office of a Director of the Company under Article 127, as a Director as an addition to the Board but so that the total number of Directors shall not at any time exceed the maximum number fixed. But any Director so appointed shall hold office only until the next following Ordinary General Meeting of the Company and shall then be eligible for re-election.

112. The qualification of a Director, other than an ex-officio Director, shall be the holding of, in his own name or jointly with any person whether beneficially or as a trustee for any company or person or otherwise, Ordinary Shares in the Company of the nominal value of Rs.5,000.

* * * * *

ROTATION OF DIRECTORS.

121. At the first Ordinary Meeting of the Company to be held in every year, one-third of the Directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office. . . .

122. The Directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became Directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

123. A retiring Director shall be eligible for re-election.

* * * * *

125. If at any meeting at which an election of Directors ought to take place the places of the vacating Directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating Directors are not filled up, the vacating Directors or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting.

126. The Company in General Meeting may from time to time increase or reduce the number of Directors, subject to the provisions of Sections 83 A(1) and 83 B(2) of the Act, and may alter their qualification and may also determine in what rotation such increased or reduced number is to go out of office.

127. The Company may by Extraordinary Resolution remove any Director, whose period of office is liable to determination at any time by retirement of Directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. . . .

128. Any casual vacancy occurring among the Directors may be filled up by the Directors. . . ."

The judgments in the Indian Courts were based on the view that the power of the Company by ordinary resolution to " increase or reduce " the number of directors conferred by article 126 is only exercisable within the limits set by the maximum of four and the minimum of three prescribed by article 109 ; and that consequently in order that there might be more than four a special resolution was required altering article 109.

If article 109 had stood alone there can be no doubt that this view would have been correct. In order to avoid the necessity for a special resolution a form has sometimes been used in which an article of this type is prefaced by words such as " until otherwise determined by the company in general meeting ". These words enable the stated maximum and minimum limits to be altered by an ordinary resolution. No such words are used in the present case. But that does not by any means conclude the matter. In order to interpret article 109 there are other

articles which require consideration. Their Lordships think that the learned judges in India did not attach sufficient importance to this aspect of the question.

The first of these to be considered is article 126 itself. Two points in it fall to be noticed: (*a*) the power is expressed to be subject to section 83 A(1) of the Indian Companies Act which provides that "every company shall have at least three directors"; and (*b*) the power extends to altering the qualification and making a change in the order of rotation of the increased or reduced number. Now if, as the High Court has held, article 126 only allows an ordinary resolution to operate between the limits of four and three prescribed by article 109, the following consequences would result: (*a*) The reference to section 83 A(1) would, as the articles stand, be unnecessary. The reason of this is that if, according to the argument, the minimum of three laid down by article 109 can only be altered by a special resolution it could not in any event be altered by an ordinary resolution which is the kind of resolution with which article 126 is dealing. (*b*) The power to alter qualification and change the order of rotation, if, as article 126 provides, it is to be exercised by ordinary resolution, must involve a departure from the provisions of articles 112, 121 and 122. Those articles are not expressed to be "subject to article 126" nor are these powers in article 126 expressed to be given "notwithstanding anything in articles 112, 121 and 122". Some such words must therefore be implied in one place or the other in order to remove the inconsistency. The omission to make such cross-references as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. There is thus no insuperable difficulty in reconciling article 109 with article 126 either by implying in the former some such opening words as "subject to article 126" or implying in the latter some such opening words as "notwithstanding anything contained in article 109".

Now if, as the Courts in India have held, the only scope for the operation of section 126 lies in the area between the maximum of four and the minimum of three the question arises, what is the use of article 126? If at a time when there are only three directors the Company wished to appoint a fourth it could do so by ordinary resolution at a general meeting without the necessity of having a special article in that behalf. For the purpose therefore of an increase in the actual number of directors to four there is no need for the article. If, however, the Company wished otherwise than by dismissal (as to which provision is made by article 127) to reduce the number to three it could do so under the very terms of section 109 itself and that notwithstanding article 125. Article 109 in effect gives an option to the Company to have no more than three directors. It therefore appears to their Lordships that in order to give effective content to the opening words of article 126 it is necessary to make an appropriate implication as suggested above, either in 109 or in 126. It is moreover to be observed that the draftsman of the articles where he wished to show that the maximum number as fixed is not to be exceeded in exercising a power to appoint additional directors, says so in terms. Under article 111 the directors have power to appoint additional directors "but so that the total number of directors shall not at any time exceed the maximum number fixed". A limit therefore which is set to the power of the Board is not repeated in the case of a general meeting.

Lastly, the power to "increase or reduce the number of directors" in their Lordships' view, according to the natural meaning of the words, means or at least includes a power to increase a maximum without necessarily making specific appointments, or (subject to section 83 A(1)) to reduce a minimum. Such a power carries with it the implication that, e.g., the vacancy created by an increase in the maximum may at the same time or subsequently be filled up by appointing an individual to fill it. (*Salmon* v. *Quin and Axtens Ltd* [1909] 1 Ch. 311, [1909] A.C. 442.) On this footing there is a direct textual conflict between articles 109 and 126 which must be remedied.

For these reasons their Lordships are of opinion that resolution No. 1 was valid.

Resolution No. 2 stands in a different position. Articles 131, 132 and 135 so far as relevant provide as follows :—

"MANAGING AGENTS.

131. The general management of the affairs of the Company shall be entrusted to Managing Agents to be appointed by the Company and the Managing Agents shall, subject to the control of the Directors, conduct the business of the Company.

132. At the date of the adoption of these Articles, Andrew Yule & Co., Ltd., are the Managing Agents of the Company, and they . . . shall continue and be the Managing Agents of the Company (unless otherwise mutually arranged . . . or unless they shall voluntarily resign that office) for the period of 15 years certain from the 30th day of October, 1929, and thereafter until they shall be removed therefrom by an Extraordinary Resolution of the Company, passed at an Extraordinary General Meeting specially convened for that purpose, and of which not less than six calendar months' notice shall be given, and at which persons holding or representing by Proxy or Power-of-Attorney, not less than three-fourths of the issued Ordinary capital of the Company for the time being, shall be present.

135. The Managing Agents shall have the general management of the Company's business. . . ."

The complaint against this resolution is that under article 132 the managing agents could only be removed by an extraordinary resolution as there mentioned and that to attempt to remove them by an ordinary resolution constituted a violation of the rights of the minority shareholders. In substance three points were argued by the appellants. First they referred to section 87B of the Indian Companies Act the relevant provision of which is as follows:—

Section 87B.—*Conditions applicable to managing agents.*—Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company—

* * * * *

(f) the appointment of a managing agent, the removal of a managing agent and any variation of managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in Section 86E:

This, it was suggested, empowered the Company to remove its managing agents by ordinary resolution. In their Lordships' opinion this suggestion misinterprets the provision which is directed solely to securing that a managing agent shall not be validly appointed, removed or have his contract altered without a resolution of the Company. The next point also lacks substance. It was that to affirm the continuance in force of the managing agents' appointment amounted to specific enforcement of a contract of personal service and was a violation of section 27 (*b*) of the Specific Relief Act, 1877. The effect of the decree appealed against is not, however, of that nature. It merely prevents dismissal of the managing agents or termination of their appointment at the instance of a majority in violation of the articles of association of the Company which the minority are entitled to have observed. As between the Company and the managing agents it certainly has not the effect of enforcing a contract of personal service.

The last point was that the matter was one concerning the internal management of the Company in which the Court will not on principle interfere. In their Lordships' opinion it is much more than that. To treat the resolution as effective would mean that the Company could terminate the appointment of the managing agents by ordinary resolution contrary to

the article which requires an extraordinary resolution. This requirement was obviously intended as a protection to a minority who are not to have the appointment terminated against their will unless a particular majority votes in favour of it. Accordingly, their Lordships are in agreement with the decision of the Indian Courts in regard to resolution No. 2.

The first injunction granted by the High Court restrained the defendants "from acting as directors of or dealing with the funds of or using the seal of or otherwise interfering in the management and affairs of the plaintiff Company except when validly appointed". This injunction which was based on the finding of the invalidity of resolution No. 1 cannot now stand. The second injunction restrained the defendants their agents and servants "from interfering or intermeddling in the management of the plaintiff Company (by its managing agents Andrew Yule and Company Limited) until the valid termination of their contract in conformity with the articles of the plaintiff Company". This injunction was granted in view of the fact that the defendants were acting on the assumption that both resolutions were valid and were taking a number of steps with a view to putting into force resolution No. 2. Their Lordships see no necessity for continuing this injunction. There appears to them to be no reason to suppose that the defendants will take any action which would be inconsistent with the declaration as to the invalidity of resolution No. 2. Moreover, this injunction might impede the board, of which the appellants are in their Lordships' opinion validly elected members, in exercising the control over the managing agents for which article 131 makes provision.

It remains to mention one further point. The Company was and could be made a plaintiff only on the basis that the seven appellants were not directors. As in the result they have been held to be directors the use of its name as plaintiff was unauthorised. Accordingly the Company should, in their Lordships' opinion, be struck out as plaintiff. On the other hand it is necessary that the Company should formally be bound by the order. Normally in a representative action by a minority shareholder the Company would be made a defendant and their Lordships consider that it should be added as a defendant. The appellants as the majority of the board formally by their counsel consent to that course.

Accordingly their Lordships will humbly advise His Majesty that the appeal should succeed as to resolution No. 1 but should fail as regards resolution No. 2: that there should be a declaration of the validity of resolution No. 1 and the declaration as to the original four being the only proper directors should be struck out: that all the injunctions should be discharged: and that the record should be amended by striking out the name of the Company as plaintiff and adding it as defendant. The respondents having succeeded in both courts in India on all issues were given their costs throughout. As a result of this appeal they ought to have failed on resolution No. 1 and succeeded only on resolution No. 2. In view of this their Lordships consider that there should be no costs of the proceedings either in the Indian Courts or on this appeal.

(67180) Wt. 8084—42 190 1/50 D.L. G. 333

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DELIVERED BY LORD GREENE

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