

Ruby Mills Limited and Another Vs. Union of India and Another

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Court : Mumbai

Decided On : Jun-29-1984

Reported in : [1985]57CompCas193(Bom)

Judge : S.C. Pratap, J.

Acts : [Companies Act, 1956](#) - Sections 198, 198(1), 309, 309(1), 310 and 314

Appeal No. : Writ Petition No. 1165 of 1980

Appellant : Ruby Mills Limited and Another

Respondent : Union of India and Another

Advocate for Def. : Mr. Parkar

Advocate for Pet/Ap. : Mr. Talyarkhan

Judgement :

Pratap, J.

1. This petition under art, 226 of the Constitution raises a short but interesting question relating to interpretation of ss. 309 and 310 of the [Companies Act, 1956](#), viz :

'Do the professional fees and charges payable by a company to an advocate and solicitor, who also happens to be its director, continue to constitute 'remuneration '

within the meaning thereof in ss. 309 and 310 of the Companies Act even after the Central Govt. express its opinion affirmatively in terms of the proviso to s. 309(1) ?'

2. Facts, abbreviated to the relevant minimum, are as below.

3. The second petitioner, J. D. Masani, is a qualified advocate and solicitor and has been practising as such since about 1965. He joined M/s. N. C. Dalal & Co., a firm of advocates and solicitors (hereinafter 'the said firm'), as a partner and later from February, 1977, became its sole proprietor. This firm has been rendering professional service to the first petitioner, the Ruby Mills Ltd. (hereinafter 'the company') for more than the last twenty-five years.

4. In March, 1977, the second petitioner was appointed director of the company and was later elected and subsequently re-elected as director and continued to be so at all relevant times. However, since long before he became such director as also thereafter, he has been, in his capacity as advocate and solicitor, rendering to the company professional services for which professional fees and charges becomes payable to him against bills of costs submitted in that behalf.

5. To exclude such fees and charges from the total remuneration payable to the second petitioner by the company, it became necessary to obtain, under the proviso to s. 309(1) of the Act, opinion of the Central Govt, to the effect that he possesses the requisite qualifications for the practice of the profession of law. Application was accordingly made. By its order dated June 28, 1980 (Exhibit F), the Central Govt. intimated its opinion affirmatively, i.e., the second petitioner, a director of the company, has the requisite qualifications for functioning as legal adviser of the company. This opinion was, however, hedged in by a condition, viz :

'I have to add that if any payment is to be made to Shri Masani for rendering legal services, it should be subject to prior approval of the Government under s. 310 of the Act.'

6. Representation to the Government to reconsider this condition and delete the same was rejected. Hence, this petition challenging the legality and validity of this condition (hereinafter 'the impugned condition').

7. Contention of Mr. Talyarkhan, learned counsel for the petitioners, is that once an affirmative opinion is given by the Central Govt. Under the proviso to section 309(1), the professional fees and charges payable to the second petitioner, Masani, as an advocate and solicitor would cease to be remuneration under the Companies Act and it was, thereafter, not open to attach to the said opinion, condition such as the one impugned herein. The said condition was not legal and valid. Mr. Parkar, learned counsel for the respondents, seeks to support the impugned condition and asks for dismissal of this petition.

8. Before proceeding further, section 309(1) and 310 of the [Companies Act, 1956](#) (hereinafter 'the Act'), may be noted :

'309(1). Remuneration of directors. - The remuneration payable to the directors of a company, including any managing or wholetime 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 articles 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.

310. Provision for increase in remuneration to require Government sanction. - In the case of a public company, or a private company which is a subsidiary of a public company, any provision relating to the remuneration of any director including a managing or wholetime director, or any amendment thereof, which purports to increase or has the effect of increasing, whether directly or indirectly, the amount thereof, whether that provision be contained in the company's

memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or by its board of directors, shall not have any effect unless approved by the Central Government; and the amendment shall become void if, and in so far as, it is disapproved by that Government :

Provided that the approval of the Central Government shall not be required where any such provision or any amendment thereof purports to increase, or has the effect of increasing, the amount of such remuneration only by way of a fee for each meeting of the board or a committee thereof attended by any director and the amount of such fee after such increase does not exceed two hundred and fifty rupees.'

9. Though these two provisions read with s. 198 of the Act take in their sweep the concept of 'remuneration' in its various facets, the first proviso to section 309(1) carved out, categorically and expressly, a specific exception in the case of remuneration for services rendered by an advocate and/or solicitor who also happens to be a company provided, however, the Central Govt. expressed its affirmative opinion that he possesses the requisite qualifications for functioning as legal adviser of the company. Now, here, the Central Govt. did express its affirmative opinion accordingly. Having done so, there was then no legal warrant or justification for nevertheless imposing the impugned condition that even so, any payment to be made to him, the second petitioner, even for rendering professional legal services, should be subject to prior approval under s. 310 of the Act. The impugned condition in effect seeks to include, albeit indirectly, professional fees and charges in 'remuneration' though the same stand directly excluded therefrom by virtue of the Central Govt.'s affirmative opinion. The said condition also runs contrary to the fair and just compliance of s. 309(1) and the proviso thereto and virtually negates the intended consequence of the opinion in question and, in the process, renders the same infructuous or ineffective. If such condition was to be imposed, to what purpose then was the opinion of the Central Govt. This opinion was surely not intended to be an innocuous exercise in futility. It has definite significance. It was a certain value and from it certain value and from it flows certain consequences. The impugned condition, however, nullifies the very

purposes and *raison d'être* of this opinion of the Central Govt. and renders it bereft of any practical utility.

10. If a director renders professional services not as a director but as a qualified professional, such professional services would be *de hors* his directorship and *de hors* his directorial or managerial services. Section 314 of the Act does contemplate discharge, albeit by a director, of functions other than directorial or managerial in character. And if his qualified professional capacity is firstly duly certified by the Central Govt. by its affirmative opinion in terms of the proviso to s. 309(1), the professional fees and charges payable to him as a qualified professional would then stand excluded and exempted from and would then stand excluded and exempted from and would no longer form part of the managerial remuneration, which remuneration alone is limited by the ceiling under s. 198 of the Act. The crux under s. 198 is managerial remuneration and not remuneration. In this context, it may be relevant to note that the Companies Act Amendment Committee (The Shastri Committee) had in its report stated :

'Having given our careful thought to this matter, we have come to the conclusion that section 198 was intended to apply to remuneration for managerial and, therefore, we have recommended the additional of the word 'managerial' between the words 'total ' and 'remuneration' in sub-section (1).'

11. This recommendation was accepted and by the Companies (Amendment) Act, 1960, the words 'total remuneration' in s. 198(1) were substituted by the words 'total managerial remuneration'. This thus accords legislative sanction to the distinction maintained between 'remuneration' and 'managerial remuneration'.

12. Again, if the term 'remuneration' in s. 309(1) and s. 310 of the Act is the same - as is indeed the stand of the respondents, *vide* para 13 of their affidavit-in-reply - then, once affirmative opinion in terms of the proviso to s. 309(1) given by the Central Govt. then the exception carved out by virtue of the said proviso takes effect *ipso facto* and excludes fees and charges for professional services from the said term 'remuneration' in relation to not only s. 309 but also s. 310 of the Act. There is a vital difference between the stage prior to the Central Govts'. affirmative opinion *supra* and the stage thereafter. The fulfilment of the conditions attracting

the legislative exception embodied in the proviso to s. 309 frees the company as also the concerned qualified professional (who is also a director of such company) from the statutory control over managerial remuneration or remuneration by virtue of ss. 198, 309 and 310 of the Act. Besides, as observed by Chagla C.J., in *Ramaben Thanawala v. Jyoti Ltd.* [1975] 27 Com Cas 105, 110(Bom) :

'..... it is difficult to understand why a company should employ a technical expert and pay him whatever amount it thinks proper and there should be no control with regard to it, and yet the company should be prohibited from making use of the technical knowledge of a director and pay him a proper remuneration.'

13. These observations made in 1956 acquire greater force after the enactment of the proviso to s. 309(1) by the Companies (Amendment) Act, 1965.

14. Indeed, to hold otherwise lead to rather startling result and unintended consequences and become akin to obtaining professional services free of charge. To illustrate, one may well visualises a qualified surgeon also being a director of a company. Could it be object of the Act that even after the Central Govt. expressed its opinion in terms of the proviso to s. 309(1), the professional charges payable to him in respect of his professional services, e.g., surgical operations performed by him qua employees of the company, would still constitute 'remuneration' within the meaning of ss. 309 and 310 of the Act. Unhesitating answer would be in the negative. Take also for instance a qualified chartered accountant who also happens to be a director of a company. Was it the intention of the Act that even after the Central Govt. expressed its opinion in question, the professional fees and charges payable to him would still constitute 'remuneration' within the meaning of ss. 309 and 310 of the Act. Once again the answer would be in the negative. Indeed, one can well visualise further such instances, e.g., professionally qualified engineer or architect. It is not the object of the Companies Act to regulate and control the practice or the fees of qualified professionals. That jurisdiction vest elsewhere, And, what is more, but for the conditional legislative exception under the proviso to s. 309(1) which, on compliance, exempts professional fees and charges from 'remuneration', the restriction de hors the said proviso may well become

unreasonable and absolute in its effect and consequently render itself vulnerable to a constitutional challenges as violating one's fundamental right to practise his profession, merely on becoming a company director simpliciter. It may, however, be observed that the position is not likely to be the same and would perhaps be different in the case of management, investment, financial or other consultants not professionally qualified and no belonging to any recognised profession as such.

15. Mr. Tayarkhan invited my attention to a decision of the Kerala High Court in R. Gac Electrodes Ltd. v. Union of India [1952] 52 Com Cas 288, where, under facts and circumstances similar hereto, relief to the same effect reasoning and conclusion therein.

16. In this view of the matter, this petition succeeds and is allowed. The orders dated July 31, 1980 (exhibit 'H'), is set aside and quashed. The impugned condition embodied in para 4 of the dated June 26, 1980 (exhibit 'P'), is also set aside and quashed. The petitioners will be entitled to the benefit of the said order dated June 26, 1980, with the impugned condition deleted therefrom.

17. Rule is made absolute in terms aforesaid. In the circumstances of the case, however, there will be no order as to costs.

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