

Ramkumar Potdar Vs. the Sholapur Spinning and Weaving Co. Ltd.

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Court : Mumbai

Decided On : Mar-22-1934

Reported in : AIR1934Bom109; (1934)36BOMLR907

Judge : John Beaumont, Kt., C.J. and ;Rangnekar, J.

Appeal No. : O.C.J. Appeal No. 47 of 1933 and Suit No. 131 of 1933

Appellant : Ramkumar Potdar

Respondent : The Sholapur Spinning and Weaving Co. Ltd.

Disposition : Appeal dismissed

Judgement :

John Beaumont, Kt., C.J.

1. In this case the plaintiff sues on behalf of himself and the other shareholders of the Sholapur Spinning and Weaving Co. Ltd., and he asks, first, for a declaration that certain resolutions passed by the directors, which resolutions were for the dismissal of the company's agents, are in contravention of the memorandum and articles of association of the company, and are not binding on the members of the defendant company, and, secondly, for an injunction to restrain the defendants from acting upon the resolutions. Defendant No. 1 is the Sholapur Spinning and Weaving Co. Ltd., and the other defendants are the directors. It is a well-settled principle in company law that the Court does not generally interfere with the

internal management of the affairs of a company, and, if the majority of the shareholders consider that a particular contract of employment should be terminated, the Court would not as a rule consider the matter at the instance of a minority of shareholders. To get over that difficulty, it is contended by the plaintiff that the dismissal of these agents is an act ultra vires the company, and, no doubt, the case of acts ultra vires the company does constitute an exception to the general rule that the Court will not interfere in the management of a company. But it is, on the face of it, startling to find it suggested that the dismissal of persons in the employment of the company, or under contractual relations with the company, is an act ultra vires the company. To get over that difficulty, the plaintiff alleges that the rights of the agents arise under the memorandum of association of the company, and, therefore, cannot be altered. But, at that point, another difficulty arises, i. e., that the memorandum of association, as it has been held many times, does not constitute a contract between the company and a third party who may be named therein. So that, ultimately, the argument assumes some such form as this, that it is a vital part of the constitution of the company that the company should employ the agents, that the company should conduct its business through the services of the agents, that that obligation arises apart from any contract with the agents, and that it is an obligation imposed upon the company as part of its charter which cannot be altered, having regard to the terms of Section 10 of the Indian Companies Act. In my opinion, the argument is quite untenable, and the plaintiff's action is wholly misconceived. With whatever skill the real object of the plaintiff is concealed, it is quite plain that the order which he asks for would have the effect of restraining the company from dismissing the agents, and it is well-settled that the Court will not make an order the effect of which is to enforce specifically any contract of personal service.

2. But, I think, the case may be based on another ground, because I am not prepared to accept the argument of the plaintiff that the material clause in the memorandum is really a vital part of the constitution of the company, or a condition of the memorandum within the meaning of Section 10 of the Indian Companies Act. The clause in question, which is Clause 6, is not incorporated amongst the objects of the company, but is an independent clause, and it is in these terms:-

That the firm of Morarjee Goculdas & Co., of Bombay, merchants, or whatever member or members that firm may for the time consist of, shall be the agents of the company, so long as the said firm shall carry on business in Bombay or until they shall resign, and they shall receive a commission of anna per lb. on all the yarns and other material manufactured and sold by the company; should however the company during any one year be unable to declare a dividend of 4 per cent. owing to their profits being 'less than that amount, the agents shall only be paid one-third of the above commission.

3. The clause does not purport in terms to impose any obligation of service upon the agents. It merely provides what remuneration the agents shall receive. Now, properly construed, it seems to me that what that clause really does is to provide that the company shall enter into a contract of agency, on the terms indicated, with the firm of Morarjee Goculdas & Co., that it confers a power upon the company and might more properly have been included amongst the objects of the company. Mr. Taraporewala for the plaintiff objects to that view of the matter, and says that there is no question of any contract between the company and the agents, but directly the company, after its incorporation, employs the agents, which it can only do with the agents' consent, contractual relations must arise, and the clause must in effect impose on the company an obligation to enter into a contract with a third party. It has been held many times ;that a company cannot be bound by a contract entered into on its behalf before the company was formed, and, in my opinion, it is not competent to bring a company into existence bound to enter into a contract with a third party, the terms of which have been arranged before the company was formed. It is for the company to consider after its formation whether it will enter into the contract or not.

4. There is a further objection to the plaintiff's case in that, in my opinion, Clause 6 of the memorandum of association, even if construed as the appellant desires, merely imposes on the company an obligation as to management and is not a vital part of the constitution of the company. In support of the view that a clause of this nature is a condition of the constitution of the company, Mr. Taraporewala relies on the case of Venkataramana v. Coimbatore M. Bank A.I.R. (1924) Mad. 126. That was an application to the Court on a petition, under Section 12 of the Indian

Companies Act, asking the Court to confirm a special resolution for the alteration of a memorandum of association by striking out a clause somewhat in the terms of Clause 6 in the present memorandum. The Court refused to strike out the clause, but in giving judgment Sir 'Walter Schwabe, the Chief Justice, did no doubt say that a clause of this nature is a condition of the memorandum, but he based his view expressly on the ground that the clause in the memorandum constituted a vital contract between the company and the person to be employed as agent, and, I think, it cannot have been present to the mind of the learned Chief Justice, first, that a company cannot be bound by a contract made before it comes into existence, and, secondly, that the memorandum of association does not operate as a contract between the company and persons who are not members of the company. I think, therefore, that the views of the learned Chief Justice as to the nature of a clause of this character cannot be supported. It is, to my mind, almost impossible to conceive of a case in which the Court would, at the instance of a minority of shareholders, compel a company to enter into, or carry out, a business contract which the majority of the shareholders and the directors considered to be detrimental to the interests of the company, the terms of which contract had actually been arranged before the company was brought into existence.

5. There is an alternative ground which, I think, is equally fatal to the plaintiff's case, and that is, that even assuming that Clause 6 of the memorandum has the effect for which the appellant contends, the present members of the firm of Morarjee Goculdas & Co. do not come within the terms of that clause. The clause provides, as I have said, that the ' firm of Morarjee Goculdas & Co.' or ' whatever member or members that firm may for the time consist of ' shall be the agents, etc. Strictly speaking, as soon as new members are introduced into the firm, a new firm is constituted. The plaintiff relies on the words, ' whatever member or members that firm may for the time consist of', but the facts are that at the date of the incorporation of the company the firm consisted of two individuals, one of whom died in 1880, and the other of whom died in 1908, and none of the present members of the agency firm were ever partners with either of those two individuals. Whatever meaning may be given to the words, ' whatever member or members that firm may for the time consist of ', it seems to me quite impossible to say that* the present members of the firm of Morarjee Goculdas & Co., who were

never members of the firm at a time when either of the persons who constituted the firm at the date of the incorporation of the company were alive, can be said to be members of the firm named in the memorandum. The argument of the appellant really seeks to endow this firm with the attributes of a corporation having perpetual succession so far concerns its relations with the company. It is further suggested by Sir Chimanlal Setalvad that if the clause has the extended meaning contended for by the appellant, it would be void in law, but it is not necessary, in my opinion, to consider that argument.

6. There is another point taken against the appellant, namely, that, again giving to Clause 6 the effect for which he contends, at the most it only outlines the nature of the contract into which the company was to enter with the agents. It is contended, I think rightly, that the company, when entering into an actual contract with the agents, would be entitled to incorporate proper provisions including power to terminate the agency for sufficient reason.

7. For all these reasons, I think the learned Judge was quite right in dismissing the action with costs, and that the appeal must be dismissed with costs.

Rangnekar, J.

8. I agree. In my opinion there is more than one fatal answer to the claim of the plaintiff in the suit. Apart from the fact that: the clause in question is one-sided in that it does not impose any obligation on the firm of Morarjee Goculdas, it is nothing more, in my opinion, than a preliminary contract such as promoters make before incorporation of the company, and means nothing more than that the company should enter into a contract of agency with the firm of Morarjee Goculdas. In fact that seems to be the plaintiff's case, and that is clear from para. 6 of the plaint. Then one answer to the plaintiff's claim would be that a company cannot before its incorporation enter into a contract, for it is non-existent, and another that, except by any act of legislature, it is not possible to bring a company into existence under the Indian Companies Act bound by a contract previously made, for such a contract cannot be ratified after incorporation. In order to get over this difficulty, the plaintiff contends that this is not a contract of employment, but it

is really a vital condition on which the company was constituted. Now the authorities show that a memorandum of association may contain conditions essential as well as conditions non-essential, and the question is, whether this is an essential condition. Undoubtedly, it is not mentioned in the objects, where perhaps, properly speaking, it might have been mentioned, and it stands by itself. What are conditions essential is indicated by the frame of the Indian Companies Act, and the scheme contained therein, and it would be very unreasonable to hold that a condition of this nature which is after all, whatever way you look at it, nothing more than a detail of management for the purpose of carrying on the business of the company, can be considered to be a vital condition and cannot be altered, when the Act provides that conditions which are vital to the very existence of the company, such as for instance, the name of the company, the objects of the company, and so on, can be altered, undoubtedly in a limited way, in accordance with the provisions of the Indian Companies Act. The learned Counsel for the appellant says that the rights of the agents are created by the memorandum of association, but the answer to that is that the memorandum of association does not constitute a contract between the company and a third party, though named therein.

9. Then there is another point, and it is that the condition, on the face of it, is unreasonable, and it is no use saying that the shareholders subscribed on the faith of it. There is no obligation imposed on the agents either to act as agent or go on acting as agent. Supposing, for instance, the agents refuse to work as agents, I do not think it can be contended that the company, or the shareholders, or majority of the shareholders interested in the continuance of the company, have no power to appoint other agents in their place. Similarly, if the agents are found guilty of fraud, or are not properly managing the business, it cannot be contended that the company cannot appoint other agents in their place. Then it is said that it is open to the shareholders to dissolve the company. But supposing, for instance, that the majority of the shareholders are of opinion that the company is in flourishing condition, and that there was no necessity to have it wound up, what then? Can it be contended that the substratum of the company is gone, or it is just and equitable that the company should be wound up because A, B, C, who were agents, refuse to act and refuse to resign? In my opinion the clause in question

does not constitute a vital condition.

10. Then assuming, however, it is a vital condition, I have no doubt that the plaintiff must fail on a true and proper construction of the clause in question. It was conceded that unless that clause was construed to mean that the agents of the company should be 'the firm of Morarjee Goculdas & Co., its successors or assigns ', the plaintiff must fail. There is nothing in that clause which would justify such a construction. In my opinion the clause really means this, that Morarjee Goculdas & Co. or those who, as the facts show, were then about to carry on business in the name of Morarjee Goculdas & Co. were to be appointed agents of the company. But the utmost length to which one can go is, that under this clause the agents were to be the then firm of Morarjee Goculdas or his surviving partners. The original surviving partner having died in 1908, the firm came to an end, and, although, for reasons into which it is not necessary to enter, the heirs of Morarjee Goculdas were admitted into partnership, and the company went on employing them and utilised their services, it is difficult to see how in 1930 the present members of the firm who, admittedly, have no connection with Morarjee Goculdas, or any of his surviving partners, could be said to be members of the firm within the meaning of Clause 6 of the memorandum. Assuming, however, that the construction which the plaintiff seeks to put upon the clause is correct, even then, I think, the Court would be justified in refusing an injunction. No Court will grant an injunction in a case the effect of which will be to compel specific performance of a contract of personal service. The plaintiff relies upon *Venkataramana v. Coimbatore M. Bank* A.I.R [1924] . Mad. 126 With all respect to the learned Judges of the Madras High Court, I am unable to agree with their decision for the reasons given in the judgment of my Lord the Chief Justice.

11. The appeal fails, and must be dismissed with costs.