

(1958) 11 BOM CK 0034

Bombay High Court

Case No: I.C. Petition No. 190 of 1958

Krishnaprasad Jwaladutt Pilani

APPELLANT

Vs

Colaba Land and Mills Co. Ltd.

RESPONDENT

Date of Decision: Nov. 20, 1958

Acts Referred:

- Companies Act, 1956 - Section 16, 166, 166(1), 168, 17(2)

Citation: AIR 1960 Bom 312 : (1959) 29 CompCas 273

Hon'ble Judges: S.T. Desai, J; K.T. Desai, J

Bench: Division Bench

Judgement

S.T. Desai, J.

A question of considerable importance and some interest arises on this application under the new Companies Act of 1956 and the question relates to the tenure of office of what are usually described as directors elected at annual general meetings of companies. Section 166 of the new Companies Act lays down that the first annual general meeting shall be held by a company within eighteen months of its incorporation. It also lays down that the next annual general meeting of the company shall be held by it within nine months after the expiry of the financial year in which the first annual general meeting was held; and thereafter an annual general meeting shall be held by company within nine months after the expiry of each financial year. Stripped of details the pervasion for years subsequent to the first annual general meeting is that a company shall call its annual general meeting within nine months after the expiry of its financial year. That provision is mandatory. It is express and explicit. Ordinarily, elected directors of companies are not appointed for any specified period of time in terms of years. They retire by rotation and they retire from their office of directorship at a date which would be the date of the statutory annual general meeting of the company. The question which we have to determine is whether in a case where despite the mandatory provisions of section 166 and in breach of their duty as directors, the directors do not call an annual

general meeting of the company for any length of time, can they claim to continue in their office of director after the expiry of the period mentioned in the section for calling the statutory meeting. Prima facie the contention that they can continue to hold the office in any such case would seem wholly unsound. But we are told that there is a provision in the Companies Act, which, is properly interpreted, leads to such an undesirable result.

2. The application before us is by the Colaba Land and Mills Co. Ltd. and the circumstances in which it is made are these. On April 14, 1955, the annual general meeting of the company was held for the year 1954. The financial year of this company, which is a public company, ends on December 31. At that meeting Jayantilal N. Patel retired by rotation and being eligible for re-election re-elected as a director. The annual general meeting for the year 1955 was held on March 29, 1956. At that meeting V. J. Pilani retired by rotation and being eligible for re-election was re-elected. The annual general meeting for the year 1956 has not been called to this date. The period for holding that meeting was extended by the Registrar up to March 31, 1958. Even so that meeting was not held. Nor has the annual general meeting for the year 1957, there were certain changes in the constitution of the board of directors of the company as some directors resigned and one of them died. In November, 1957, the position as regards the personnel of the board of directors of the company was this :

(1) V. J. Pilani who had been elected in the annual general meeting of the shareholders on March 29, 1956.

(2) Jayantilal Patel who had been elected in the annual general meeting of the shareholders of the company on April 14, 1955.

(3) K. J. Pilani who had been elected in the annual general meeting of the shareholders on April 22, 1954.

(4) R. S. Sethna who had been appointed by the Central Government on November 12, 1957.

(5) F. S. Wadia who had been appointed by the Central Government on November 21, 1957.

(6) Solomon Moses who was elected as an additional director of the company u/s 260. That was in November, 1957.

3. On September 30, 1958, the personnel of the board of directors of the company was the same with this difference that K. J. Pilani who, it was said, had vacated his office, was co-opted as director on September 8, 1958. An objection was raised by one of the directors appointed by the Central Government to the attitude taken up by two of the directors, Jayantilal Patel and Solomon Moses, that they had continued to be directors of the company, although if annual general meetings of the company had been held as required by section 166, they would have retired long

since. Their contention was that despite non-conformity with the provisions of section 166 they continued to be directors of the company and were entitled to act as such till the date when an annual general meeting of the company might be held in future. The company has come before us on this application and the question we are asked to determine is whether Jayantilal Patel and/or Solomon Moses have ceased to be directors of the company.

4. The relevant part of section 166 of the new Companies Act to which we have already made some reference may be set out here :

"166. Annual general meeting. - (1)(a) Every company shall, in addition to any other meetings, hold a general meeting which shall be styled its annual general meeting at the intervals, and in accordance with the provisions, specified below.

(b) The first annual general meeting shall be held by a company within eighteen months of its incorporation.

(c) The next annual general meeting of the company shall be held by it within nine months after the expiry of the financial year in which the first annual general meeting was held; and thereafter an annual general meeting shall be held by the company within nine months after the expiry of each financial year :

Provided that the Registrar may, for any special reason extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a further period not exceeding six months.

(d) Except in the case referred to in the foregoing proviso, not more than fifteen months shall elapse between the date of one annual general meeting and that of the next."

5. Section 16 empowers the Central Government to call an annual general meeting where default is made in holding an annual general meeting in accordance with section 166. Section 168 is material and it inflicts penalty for default in complying with the provision of section 166. The company and every officer of the company who is in default is liable to punishment with fine which may extend to Rs. 5,000. The other material sections are sections 255 and 256 which are as under :

"255. Appointment of directors and proportion of those who are to retire by rotation. - (1) Not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall -

(a) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulation in the articles of the company, also appointed by the company in general meeting."

"256. Ascertainment of directors retiring by rotation and filling of vacancies. - (1) At the first annual general meeting of a public company, or a private company which is a subsidiary of a public company, held next after the date of the general meeting at which the first directors are appointed in accordance with section 255 and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is not three or a multiple of three, the number nearest to one-third, shall retire from office.

(2) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

(3) At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto ..."

6. V. J. Pilani, respondent No. 2, Jayantilal Patel, respondent No. 4, and K. J. Pilani are represented different counsel and have made their submissions before us. The company is represented by separate counsel and the company has also made its submissions before us. Solomon Moses, although he is not a party to the petition, is also represented by counsel. Learned counsel for the company as well as these directors have pressed before us the contention that the position in law is that even though there is the breach of the statutory duty on the part of the directors in not calling an annual general meeting of the company as required by law, they continue and will continue to be the directors of the company till an annual general meeting is in fact held. The directors appointed by the Central Government have opposed that contention. The greatest reliance has been placed by learned counsel for those directors and the company on certain words in section 256 of the Act and the words are : "At the first annual general meeting" and "at every subsequent annual general meeting". It is urged that the directors who are liable to retire by rotation continue to hold their office as directors till the annual general meeting is in fact held. It is said that there is no other provision in the Act which indicated any contrary rule. It is also said that if the directors have committed a breach of the statutory requirement of section 166 pertaining to calling of annual general meeting, that is irrelevant for the present purpose and if it has any relevance that would only be on the question of penalty which may be inflicted on them u/s 168 for default in complying with the provisions of section 166 relating to calling of annual general meetings. It is urged that support is to be derived for this construction when reference is made to the proviso to sub-clause (c) of section 166(1) which empowers the Registrar for any

special reasons to extend for a further period not exceeding six months time within which an annual general meeting should be held. It is pointed out that if the view pressed for the acceptance of the court by the directors appointed by the Central Government were to be accepted, the directors would ordinarily retire at the expiry of nine months from the date of the end of the financial year of the company, and if thereafter the Registrar were to extend the time for the calling of the annual general meeting, the directors who had vacated their office on retirement would not be able to seek re-election. It is difficult to see why they would not be able to seek re-election. But assuming that it is so, we do not see how that can affect the legal position. Another hardship sought to be pointed out on behalf of the company was that if the Central Government were to intervene and call an annual general meeting at a later date the directors who would be treated as having vacated their office latest at the end of nine months from the expiry of the financial year, of the company would be prejudiced. There is no substance in this suggestion either. The question that we have to consider really lies in a very narrow compass and it is whether the tenure of the elected directors can continue after the expiry of the statutory period laid down for calling an annual general meeting? Section 255, as we have already mentioned, is material. It deals with the appointment of directors and proportion of those who are to retire by rotation. Clause (a) of sub-clause (1) speaks of two-thirds of the number of directors as persons whose period of office is liable to determination by retirement of directors by rotation. Section 256 speaks of annual general meeting. But evidently it proceeds on the basis that the annual general meeting has been called as required by statutes, i.e., section 166. In our judgment it speaks of directors who till the date of the actual calling of the meeting continued to be directors in accordance with the provisions of law. A person who is to cease to be a director by retirement at the expiry of a stated time cannot claim to have escaped such retirement simply because an annual general meeting has not been called as required by law within that time. Section 256 does not include those who vacated their office. It only applied to directors who had not already vacated their office or ceased to be directors by operation of any provision of law. It has nothing to do with the tenure of the office of a director in the proper sense of that expression. The marginal note of section 256, which we may look at for the purpose of seeing the trend of the section, speaks of ascertainment of directors retiring by rotation and filling of vacancies. It does not lay down any substantive rule as to the tenure of the office of a director. It is not the only section which has to be considered. We have to ascertain the tenure of the office of an elected director not merely from that section but from the language of sections 166, 255, and 256 read together.

7. In the context of the tenure of the office of an elected director, the general meeting at which a director liable to retire by rotation "shall retire from office" must, in our judgment, be understood to be a general meeting called in accordance with the mandatory provisions of section 166. It is extremely difficult to see how that

tenure of office can be extended simply by not calling the annual general meeting and taking shelter under the language of section 256, which, as we have already said, does not lay down any substantive provision relating to the tenure of the office of an elected director. Mr. Bhabha, learned counsel for respondent Nos., 9 and 10 is, in our opinion, right when he says that persons who have committed a breach of their duty by not calling the required annual general meeting within the statutory time cannot be permitted to say that they have not vacated their office because in fact an annual general meeting has not been called. What we have to consider is the meaning and effect of the sections to which we have already made reference, and reading those section, we find little difficulty in reaching the conclusion that a director vacates his office at the latest on the last day on which an annual general meeting could have been called as required by section 166. Now, it is not as if there is no authority in support of the view which we are inclined to take. There is a considerable body of authority in England on the construction of the analogous provisions relating to directors and there are two authorities of courts in India, one a decision of the Madras High Court and another a decision of the Calcutta High Court. It is not necessary for us to examine the English decisions in any detail since that has been done in the Madras decision to which we shall presently turn. But before we do so, it is necessary to examine the position in law on this question before the Indian Companies Act of 1956 found place on the statute book. Section 17(2) of the Companies Act of 1913 was as under :

"Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule, and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulation 78 79, 80, 81 and 82 regulation 95, regulation 97, regulation 105, regulation 107 and regulation 112, 113, 114, 115, 116 contained in that Table."

8. We are only concerned with article 78 mentioned above which was to be deemed to be contained in the articles of association of every company. That regulation was as under :

"At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequently 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."

9. The wording of the analogous provision in English law which was also a regulation was in *Pari materia*. By the Companies (Amendment) Act of 1936, section 861 was added in our Companies Act of 1913 which dealt with the question of vacation of office of a director. Sub-section (2) of that section was as under :

"Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section."

10. The position that emerges from the provision in the Companies Act of 1913 is similar to that under the present section 256.

11. A question arose in the case decided by the Madras High Court reported in *Anantalakshmi v. Indian Trades and Investment* as to whether directors who user the articles of association should have retire from the board of directors at any annual general meeting should be held to have vacated their office and ceased to be directors of the company on the last day on which an annual general meeting could have been held. The question was answered by the court in the affirmative and it was held that the directors had vacated their office despite the fact that an annual general meeting of the company had in fact not been called. The judgment was delivered by Mr. Justice VENKATARAMA AYYAR (as he then was) and in the course of his judgment his Lordship examined the decision of courts in England. The first time when the point came to be decide in England was in 1914 and that was in the case of *Consolidated Nickel Mines Limited, In re*. That decision has been accepted as laying down the correct legal position under the analogous provisions in England without being questioned at any tine since 1914. So firmly is the rule accepted as established that when the identical question arose in another case in 1944 counsel appearing for the parties accepted the decision in *Consolidated Nickel Mines Limited, In re*. That decision was accepted in the latter case in the trial court, also before the Court of Appeal and also before the House of Lords in which the leading speech was of LORD SIMONDS. All those decision and the observations there made have been considered by VENKATARAMA AYYAR J. in the Madras case and it is not necessary for us to rehearse the same. The conclusion reached by the court was that a director who was bound to retire by rotation as well as a director who was an additional director being co-opted by the other directors should be treated as having vacated their office on the last day on which the annual general meeting of the company could have been held. Incidentally, we may observe that the editors of leading text books on the subject in England have referred to the English decisions laying down the law on the subject. We are in respectful agreement with the decision of the Madras High Court.

12. Our attention, however, has been drawn to a decision of the Calcutta High Court where a different view appears to have been taken. That case in reported in *Kailash Chandra v. Jogesh Chandra* and this is all that is state in that case (p. 870) :

"With regard to the merits, the articles of association provided that the directors should be elected annually at a general meeting. It follows, therefore, that so long as the general meeting is not held in which the directors are to be elected the directors elected at the previous meeting would continue in office. It is contended by the learned advocate for the respondent that according to the true interpretation of the articles the directors would hold office only for one year form the date of their appointment, and if no general meeting is held at the lapse of one year the directors would automatically vacate their office and the company would go on without any

directors at all. I am unable to accept this contention of the learned advocate as it seems to me that it would be unreasonable to hold that this is the true meaning of the articles of association."

13. With great respect, we are unable to agree with this opinion. It appears that the attention of the learned Judges was not drawn to many aspects of the matter nor does it appear that their attention was drawn to the accepted position under the analogous provisions of the English law.

14. A distinction is sought to be made between the position of a director liable to retire by rotation and an additional director and we have been referred to section 260 which deals with additional directors. That section is as under :

"Nothing in section 255, 258 or 259 shall affect any power conferred on the board of directors by the articles to appoint additional directors :

Provided that such additional directors shall hold office only up to the date of the next annual general meeting of the company :

Provided further that the number of the directors and additional director together shall not exceed the maximum strength fixed for the board by the articles."

15. It is said that here the words used are : "shall hold office only up to the date of the next annual general meeting" and, therefore, in any event in the case of an additional director, he would not vacate his until the date of the next annual general meeting. We do not think any emphasis can be laid on the word "up to the date of the next annual general meeting." The expression "up to the date" had to be used in the context of the section because the position of an additional director is in certain respects different from the position of an elected director. One-third of the elected directors have to go out by rotation and in computing the number of directors, the additional directors are not to be taken into consideration. Therefore, it may well be that the Legislature thought it desirable that the words "up to the date" should be inserted in the section instead of "at the annual general meeting." This difference in language does not affect the real question before us.

16. In our opinion, therefore, both Jayantilal N. Patel and Solomon Moses had ceased to be directors of the Company.

17. The company will pay the costs of this application fixed at Rs. 500 of Mr. Nariman's client, whom is a director appointed by the Central Government. The company will also pay the costs of Mr. Bhabha's clients who are respondents Nos. 9 and 10 of this application fixed at Rs. 500.