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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPEAL NO. 55 OF 2014
IN
CLB COMPANY PETITION NO. 2 OF 2014

Urban Infrastructure Trustees Ltd. ...Appellant
vs
Joyce Realtors Pvt. Ltd. ...Respondent

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Mr Milind Sathe, Sr. Advocate a/w Arif Doctor i/b Junnarkar & Associates for the Appellant.
Mr Zal Andhyarujina a/w Ms Zeena Golwalla, Ms Manorama Mohanty & Ms Urjita Badhekar i/b S.K.Srivastava & Co. for the Respondent.

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CORAM : S.C. GUPTE, J.

AUGUST 11, 2015

P.C. :

This appeal impugnes an order passed by the Company Law Board ("CLB") on 8 April 2014. By the impugned order, the CLB dismissed the Appellant's Petition under Section 614(1) of the Companies Act, 1956 ("the Act"). In the Petition, the Appellant had sought an order directing the Respondent to comply with its statutory obligations and file form No.32 with the Registrar of Companies, Mumbai, to record (i) the resignation of one Mr Trevor Machado, a nominee director of the Appellant, from the Board of Directors of the Respondent, and (ii) the nomination of Mr Devesh Vyas, as a Director in place of Mr Machado.

2 The Appellant is the sole trustee of a venture capital fund known as Urban Infrastructure Venture Capital Fund. The Appellant, as a trustee of this fund, had invested in the Respondent by subscribing to equity shares and optionally fully convertible debentures. The parties had, to that end, entered into a Share Subscription Agreement as well as a Shareholders Agreement, both

dated 24 April 2008. These agreements were between the Appellant and the promoters of the Respondent. The Respondent was also party to the agreements. It is the case of the Appellant that under the Shareholders' Agreement, the Appellant and the promoters were each entitled to appoint three directors on the board of the Respondent. The Respondent was a special purpose vehicle for joint development of certain properties, which were either owned by the promoters or over which the promoters had development rights through development agreements with certain promoter group entities.

3 It is the case of the Appellant that one Trevor Machado was appointed as a nominee of the Appellant on the board of the Respondent as an additional director. He was one of the three nominees of the Appellant on the board. Mr Machado's appointment was confirmed at the general meeting of the Respondent. On 17 June 2013, Mr Machado resigned as the director of the Respondent. The Appellant nominated Mr Devesh Vyas in his place. The Appellant communicated the fact of resignation and nomination of Mr Machado and Mr Vyas, respectively,to the Respondent. Since despite such communication, statutory forms concerning the resignation and appointment were not filed on 5 September 2013, a notice was given by the Appellant, under Section 614 of the Act, to the Respondent to make good the default. Upon non-compliance of this notice, the present petition was filed by the Appellant seeking directions against the Respondent for filing of the requisite forms. The Petition was dismissed by the CLB. Aggrieved by the dismissal, the Appellant has filed the present appeal.

4 During the pendency of the appeal, the parties entered into consent terms in another company proceedings concerning the resignation of Mr Machado, whereunder the Respondent agreed to file the requisite form in respect of his resignation. That matter having thus been resolved, the present dispute pertains only to filing of the statutory form concerning the appointment of Mr Vyas in place of Mr Machado.

5 The CLB has dismissed the Appellant's petition on various grounds. For the purpose of this appeal, I propose to consider the ground of dismissal

discussed by the CLB in paragraph 14 of the impugned order, namely, that the relevant clauses of the Shareholders' Agreement concerning nomination and appointment of Directors could not override the statutory provisions concerning appointment of Directors under the Act and accordingly, there was no valid appointment.

6 Section 614 of the Act provides as follows:

> "614. **Enforcement of duty of company to make returns, *etc.* to Registrar.** (1) If a company, having made default in complying with any provision of this Act which requires it to file or register with, or deliver or sent to, the Registrar any return, account or other document, or to give notice to him of any matter, fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so, the (Tribunal) may, on an application made to it by any member or creditor of the company or by the Registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.
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> (2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.
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> (3) Nothing in this section shall be taken to prejudice the operation of any provisions in this or any other Act imposing penalties on a company or its officers in respect of any such default as aforesaid."

Section 614, accordingly, contemplates that an event or matter, which gives rise to an obligation of statutory compliance, namely, filing, registration or delivery of any return, account or other document, with or to the Registrar, has actually occurred and the company has made a default in statutory compliance with respect to such event or matter. In that case, an aggrieved party may serve a notice on the company requiring it to comply with statutory provisions in that behalf and in default, present an application with the CLB for seeking directions to make good the default. In the context of the present case, it would mean that the director nominated by the Appellant already stands appointed on the board and yet his appointment is not returned before the Registrar of Companies in the prescribed form. In such a case, an application would lie before the CLB for directions to make good the default. On the other hand, if it is the case of the Appellant that the director ought to be appointed either in terms of Articles of Association of the company or the Shareholders' Agreement, it cannot apply to the CLB under Section 614 of the Act. Alternatively, as I have pointed out below, if there is any serious controversy between the parties as to whether or not the event has occurred, namely, whether or not the director has already stood appointed, which calls for a full-fledged trial of disputed issues of fact or law, an application under Section 614 of the Act is not an appropriate remedy.

7 Mr Sathe, learned Senior Counsel appearing for the Appellant, contends that Clauses 6.2.5, 6.2.6 and 6.2.8 of the Shareholders' Agreement between the parties postulate that in the event of any casual vacancy on the Board of Directors of the Respondent, the shareholders, who had originally nominated the director are entitled to appoint another person/s to fill such vacancy and that such appointment takes effect immediately upon nomination of such director/s by the concerned shareholders. It is submitted that the agreement in this behalf, which is between 100 % shareholders of the Respondent, namely, the Appellant as investor/shareholders and the promoters as the other shareholders, has the effect of even altering the Articles of Association of the Respondent. It is submitted that, accordingly, the appointment of Mr Devesh Vyas in place of the casual vacancy caused by the resignation of Mr Machado is in keeping with the regulations of the company and is, therefore, permissible under Section 255(2) of the Act. Alternatively, it is submitted that the Articles of Association of the Respondent permit nomination of a director by the Appellant, such appointment taking place immediately upon the nomination. The reference is made to Article 12(b) of the Articles of Association of the Respondent in this behalf.

8 Section 255 and 260 of the Act, respectively, provide for appointment of directors and additional directors on the board of a company.

Sub-section (2) of Section 255, which applies to private companies, *inter alia* provides that 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 regulations in the articles of the company.......... be appointed by the company in general meeting.*" The submission of Mr Sathe is that the provisions of Clause Nos. 6.2.5, 6.2.6 and 6.2.8 have the status of Articles of Association and the statutory provision of sub-section (2) of Section 255 is subject to the regulations contained in these clauses and operates only in default thereof. He submits that these clauses must be treated as part of the Articles of Association of the Respondent and read into it. He relies on the English judgment of **Cane Vs Jones & Ors.**[1] in this behalf. The status of an agreement between shareholders and its binding effect *vis-a-vis* the Articles of Association were considered by our Supreme Court in the case of **V.B.Rangraj Vs V.B.Gopala-Krishnan**[2]. That was a case concerning transfer of shares of a private company. There was a private agreement amongst the shareholders in that case putting a restriction on a living member to transfer his shareholding only to the branch of the family to which he belonged. This, in turn, imposed a restriction on transfer of shares, which was not stipulated in the Articles of Association of the company. The Supreme Court held that the shares of a company were transferable like any other movable property and the only restriction that could be placed on the transfer was in terms of the Articles of Association. A restriction not sanctioned in the articles was neither binding on the company nor on the shareholders. Our Court in **IL & Fs Trust Co.Ltd. Vs. Birla Perucchini Limited**[3] held that the decision of the Supreme Court in **V.B.Rangraj** (supra) was not confined only to a situation involving transfer of shares but also applied to other situations, including continuance of a nominee of a particular group on the board of directors under a share subscription agreement without any corresponding amendment to the Articles of Association. This has since been followed by our Court as the law governing shareholders' agreements concerning internal management of companies. Mr Sathe, however, submits that in the case of **Vodafone**

1 1 W.L.R. 1451 (1977 C.No.1785)
2 AIR 1992 Supreme Court 453
3 (2004) 121 Comp Cas 335 (Bom)

International Holdings B.V. Vs Union of India[4], the Supreme Court refused to subscribe to the view in **Rangraj** (supra). The Court in that case observed that the view taken in the case of **V.B.Rangraj** (supra) that "*the provisions of the shareholders' agreement imposing restrictions even when consistent with the company legislation, are to be authorised only when they are incorporated in the articles of association*" was not subscribed to by the Supreme Court. The Supreme Court in **Vodafone International** further held :

> "157 *Shareholders can enter into any agreement in the best interest of the company, but the only thing is that the provisions in the SHA shall not go contrary to the articles of association. The essential purpose of the SHA is to make provisions for proper and effective internal management of the company.* It can visualize the best interest of the company on diverse issues and can also find different ways not only for the best interest of the shareholders, but also for the company as a whole. In *Shanti Prasad Jain Vs Kalinga Tubes Ltd. (1995)* 2 SCR 720, this court held that agreements between non-members and members of the company will not bind the company, but there is nothing unlawful in entering into agreement for transferring of shares. Of course, the manner in which such agreements are to be enforced in the case of breach is given in the general law between the company and the shareholders. A breach of SHA which does not breach the articles of association is a valid corporate action but, as we have already indicated, the parties aggrieved can get remedies under the general law of the land for any breach of that agreement."

What follows from the observations of the Supreme Court, firstly, is that the provisions in the shareholders agreement, which run counter to Articles of Association of a company, are not to be enforced, and secondly, even otherwise, when such agreement is enforceable, the manner of its enforcement in the event of a breach is as per the general law of the land between a company and its shareholders. The aggrieved parties can get remedies under the general law of land for any breach of the agreement, which does not breach the Articles of Association but nevertheless gives rise to a valid corporate action. In other words, our law still is that the shareholders' agreement, which is contrary to

4 (2012) 170 Comp Cas 369 (SC)

Articles of Association of a company, cannot be given effect to and even otherwise, an enforceable shareholders' agreement can be enforced only under the general law of the land and not as a company law action before the statutory authorities exercising jurisdiction under the Companies Act.

9 Mr Sathe relies upon the English judgment of **Cane Vs Jones & Ors** (supra). That was a case of a family company held by two groups of family members. The shares of the company were held equally by two groups. The two groups also had equal number of directors. The articles provided for exercise of a casting vote by the chairman of the company. By a subsequent agreement between the family members, the casting vote of the chairman was done away with and instead provisions were made for appointment of an independent chairman in the event of equality of votes. The argument before the Court was that this agreement operated as an alteration of the articles on what was conveniently called the "*Duomatic* principle" based on *In re Duomatic Ltd.* This principle is summarized in a short passage in the judgment in that case of **Buckley J.**, which is quoted below:

> ".............. I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

The English Court held that though there was no resolution or meeting passing a special resolution, by which alone the articles could be amended, the agreement between the parties did sufficiently "*represent a meeting of minds which is, after all, the essence of a meeting and the passing of a resolution.*" The Court further held that though the agreement was not sent to the Registrar of Companies for registration and in that sense, there was a gap in the registration requirements of Section 143 (equivalent to our Section 192), that does not prevent that agreement from "*overriding pro tanto - and so far as necessary – the articles of the company*." The English Court, accordingly, held that the agreement between all shareholders of the company had the effect of overriding the articles so far as was necessary. It is doubtful if this proposition of law holds sway in India in the face of the judgments of **V.B.Rangraj** and **Vodafone International Holdings B.V.** referred to above. Be that as it may, even if one were to hold that the agreement between all the shareholders of the company had the effect of overriding the Articles of Association that is not in itself sufficient for Mr Sathe to succeed. It is one thing to say that the shareholders' agreement, if the same is not contrary to the articles or even if it has the effect of overriding the articles, is a binding contract which could be enforced in a court of law and quite another to say that such agreement must be treated as a part of the Articles of Association for all purposes and particularly for the purposes of being treated as "*regulations in the articles of the company*" to which alone the provisions of Section 255 of the Act are subject, as provided in sub-section (2) of Section 255 of the Act. Articles of Association are defined in Section 2(2) of the Act. Sections 26 and 27 of the Act provide for registration of the Articles with the Registrar of Companies. Section 31 of the Act provides for alteration of the Articles by a special resolution to be passed by the company. The Articles constitute a set of rules regulating the affairs of the company. They are a rule book of the association of members and deal with a variety of situations and relations. Articles are not just an *inter se* contract between shareholders, but together with the Memorandum form the constitutional framework of the company. An important implication of the Articles is that their provisions amount to a public notice, known as a constructive notice, to all those who deal with the company. The members of the public are deemed to have notice of the manner in which the company deals with, or is expected to deal with, a particular situation. That is why when the Articles are altered by the company, the alteration has to be recorded with the Registrar of Companies and the company is required under Section 192 of the Act to embody in and annexe to every copy of the Articles a copy of every resolution which has the effect of altering the Articles. Every copy of the Articles issued after passing of such resolution or making of such amendment has to be forwarded to any member at his request, where the Articles have not been registered. Having regard to this position, it cannot possibly be contended that the shareholders' agreement amounts to "**articles of company**" for the purposes of application of sub-section

(2) of Section 255 of the Act. If Mr Sathe's argument were to be accepted, we would have to read the words "or an agreement between the shareholders of the company" after the words "the articles of the company" in sub-section (2). That is clearly impermissible.

10 Alternatively, it is submitted that the right of nomination of the Appellant is actually contained in the Articles. Article 12(b) is referred to in this behalf. Article 12 is quoted below.

> "12 a If it is provided by any trust deed or other document securing or otherwise in connection with any issue of debentures or other borrowings of the Company that any person(s) shall have power to nominate a Director, not exceeding two or 1/3rd of the strength of the Board of Directors at a time, whichever is less, of the Company then in case of any and every such issue of debentures or borrowings as the case may be the person(s) having such power may exercise such power from time to time and appoint (Director(s) accordingly. Such Director(s) may be removed from office at any time by the person(s) in whom for the time being is the power vested under which he was appointed.
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> b. The Company shall, subject to the provisions of the Act, be entitled to agree with any person, firm, body corporate, corporation, government or authority that he or it shall have the right to appoint his or its nominee(s) on the Board of Directors of the Company upon such terms and conditions as the Directors may deem fit. Such nominee(s) and their successors if appointed under this Article shall be called Special Director(s). Special Director(s) shall be entitled to hold office until requested to retire by the authority, which nominated his/them and he/they will not be bound to retire by rotation. As and whenever a Special Director(s) vacate(s) office, whether upon request as aforesaid or by death, resignation or otherwise, the person, firm, body corporate, corporation, government or authority who appointed such Special Director(s) may if the agreement(s) so provides, appoint another Director in his/their place.
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> c. The Board of Directors of the Company may appoint an alternate director to act for a director (hereinafter in this Article called "the

original director") during his absence for a period of not less than three months from the state in which the meetings of the Board are ordinarily held. An alternate director appointed under this Article shall not hold office as such for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate office if and when the original director returns to the state in which the meetings of the Board are ordinarily held."

Article 12, accordingly, contemplates an appointment of nominee directors in two contingencies. The first is provided for in sub-article (a), where it is provided by the trust deed or other document securing, or otherwise in connection with any issue of, debentures or other borrowings of the company that any person(s) shall have power to nominate directors not exceeding two or 1/3rd of the total strength of the board of directors at a time, whichever is less. The second, as provided by sub-article (b), is when any agreement between the company and any other person, firm or a body corporate entitles such latter person, firm or body corporate to appoint his or its nominee(s) on the board of directors of the company. There is a serious dispute between the parties as to which of two sub- articles applies in the present situation. Whereas it is submitted by Mr Andhyarujina, learned Counsel appearing for the Respondent, that the power to nominate is contained in the documents which are in connection with issue of debentures, namely, Subscription Agreement and Shareholders' Agreement, and thus covered by sub-article (a), it is submitted by Mr Sathe that the power to nominate arises in this case under a general agreement between the company and the Appellant and this agreement is not in connection with any issue of debentures or other borrowings of the company, and thus covered by sub-article (b). Be that as it may, we need not finally decide this controversy. Assuming that Mr Sathe's submission is correct, namely, the right to nominate a director is governed in the present case under sub-article (b), the article operates only if the concerned director is appointed **under** that article. In the present case, the original director of the Respondent, namely, Mr Machado, was clearly appointed as an additional director under the provisions of Section 260 of the Act. As per Section 260 of the Act, the provisions of Sections 255 to 259 do not affect any power conferred on the board of directors by the Articles to appoint additional directors . Such additional directors hold office only up to the date of the next Annual General Meeting of the company. Section 28 of the Act provides for adoption and application of table “A” in case the company is limited by shares. It provides that in case of a company registered after the commencement of the Act, insofar as its Articles do not exclude or modify the regulations contained in table “A”, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered Articles. Article 72 of table “A” provides for power of the board of directors of the company to appoint additional directors. The company in this case by its Articles of Association has expressly excluded only clauses, 21, 22, 25, 27, 66, 71, 84 and 99 of table “A” from their application to the company. Clause 72 of table “A”, thus, not being excluded or modified by the Articles, applies to the Respondent and is a regulation of the company in the same manner and to the same extent as if it were contained in its Articles of Association. In other words, nothing in Section 255 can affect the power of the board in the present case to appoint an additional director and it is obviously this power, which was exercised by the board while appointing Mr Machado. In fact, the resolution passed in the case of Mr Machado clearly indicates that the appointment was as an additional director under Section 260 of the Act. In fact, there is abundant material placed by the Respondent before this Court, which shows that in all earlier cases whenever nominee directors were appointed respectively by the Appellant or the Promoters, they were appointed as an additional directors; their appointments were till the time of the next Annual General Meetings and their appointments were always confirmed by the company in its Annual General Meetings. Thus, Mr Devesh Vyas was proposed to be appointed as an additional director of the company in place of Mr Machado, and such appointment was clearly governed by Section 260 of the Act read with Clause 72 of table “A”, which formed part of the Articles of the company and was not an appointment to be made **under** Article 12(b) of the Articles of Association of the company. In that case, the Article has no application to such appointment.

11 In any event, as I have noted above, Section 614 of the Act is

invoked only when an event has occurred or a matter has taken place which requires statutory compliance on the part of the company. If there are serious disputes about whether or not an event has occurred or a matter has transpired, which calls for a trial involving leading of evidence (which in this case would involve various issues which I have outlined above), Section 614 of the Act is not an appropriate remedy. The matter may have to go before an ordinary court of law for redressal of a civil wrong or, if covered by the provisions concerning oppression and mismanagement, before the CLB in a petition under Sections 397 and 398 of the Act.

12 In that view of the matter, there is no merit in the appeal. The order of the CLB does not give rise to any question of law which needs to be answered by this Court. The Company Appeal is, accordingly, dismissed. There shall be no order as to costs.

13 Since there is no basis for the observations, it is ordered that the observations of the CLB made in paragraph 13 of the order about deliberate concealment of material facts on the part of the Appellant as well as the Appellant not having approached with clean hands or withholding any material or relevant fact, shall stand deleted. As I have noticed above, the order is upheld only on the basis of the observations made by the CLB in paragraph 14 of the impugned order. The rest of the observations, particularly, those contained in paragraph 13 and 15, are set aside accordingly.

(S.C.GUPTE J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/ Order.