

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 17th November, 2015

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W.P.(C) No.10553/2015

JAGRAN PRAKASHAN LIMITED & ANR Petitioners

Through: Mr. P.V. Kapur, Sr. Adv. with Mr. Jaideep Bhambani and Mr. Sidhant Kapur, Advs.

Versus

UNION OF INDIA Respondent

Through: Mr. Manish Mohan, CGSC with Ms. Sidhi Arora, Mr. Shivam Chanana and Ms. Pooja Mishra, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the order dated 29th September, 2015 of the respondent Ministry of Corporate Affairs, Government of India of rejection of the application of the petitioner no.1 Company under Section 314(1B) of the Companies Act, 1956 (the 1956 Act) seeking approval of appointment of the petitioner no.2 Shri Tarun Gupta, a relative of the Director of the petitioner no.1 Company, as an Executive President (Commercial) of the petitioner no.1 Company at an annual remuneration of Rs.77,41,539/- for a period of five years with effect from 1st October, 2013 with annual increment of Rs.50,000/- per month.

2. The petitioners had earlier filed W.P.(C) No.7873/2014 impugning the earlier rejection dated 5th August, 2014 of the said application and which writ petition, finding that the order dated 5th August, 2014 had been passed without hearing the petitioners, was allowed vide order dated 12th March, 2015 with a direction to the respondent to decide the application afresh after taking into account submissions made by the petitioners and giving them an opportunity to present their case in a personal hearing.
3. Accordingly, the impugned order is a detailed one, giving reasons therein.
4. In the circumstance, though the petition has come up before this Court for the first time today but it has been enquired from the counsel for the respondent appearing on advance notice as to what purpose issuing formal notice of the petition and calling for a counter affidavit would serve in as much as the stand of the respondent is clear from the impugned order itself.
5. The counsel for the respondent has fairly agreed that the respondent has nothing further to show besides what is stated in the impugned order.
6. The senior counsel for the petitioners and the counsel for the respondent have thus been finally heard on the petition.

7. It is not in dispute that the petitioner no.2 was first appointed to an executive position or an office or place of profit in the petitioner no.1 Company w.e.f. 1st December, 2004 and being even then a relative of a Director, after obtaining permission from the respondent and which permission was again granted in the year 2009 for his re-appointment. The senior counsel for the petitioners informs that even for payment of enhanced remuneration to the petitioner no.2, permission was obtained and granted in the year 2008. The renewal permission granted in the year 2009 was valid till 2013.

8. The petitioner no.1 Company being desirous of re-appointing the petitioner no.2, the application for the period of five years w.e.f. 1st October, 2013 was filed.

9. The respondent, by the impugned order has held:-

A. that in view of the coming into force of Section 188(1)(f) of the Companies Act, 2013 (the 2013 Act) w.e.f. 1st April, 2014, no approval for the period w.e.f. 1st April, 2014 onwards is required, subject to the appointment complying with certain prescribed conditions and which aspect has not been gone into

in the impugned order; thus the subject application was concerned only for the period of 1st October, 2013 to 31st March, 2014;

- B. that Director's Relatives (Office or Place of Profit) Rules, 2003 earlier in force were replaced by Director's Relatives (Office or Place of Profit) Rules, 2011 and the approval for the period from 1st October, 2013 to 31st March, 2014 was considered under the 2011 Rules;
- C. the Ministry, in such cases, had been following the principle that the individual appointee in case he happens to be a relative of a Director of the Company from which the remuneration is proposed to be drawn, has to be under exclusive appointment of the same company and he cannot get round this provision of the Rules by claiming to serve in a non-executive capacity and/or without any remuneration in other companies; it was thus reasoned that the very fact that a relative of a Director of a Company is serving at Board level in any other Company and is not in exclusive employment of the applicant company is

sufficient to withhold the Central Government's approval for such an arrangement; and,

- D. finding that the petitioner no.2 is an appointee in two other companies in a non-executive and in a non-remunerative capacity, the approval for the period from 1st October, 2013 to 31st March, 2014 has been denied;

The contention of the petitioners that the three other companies in which the petitioner no.2 is a Director belong to the same group as the petitioner no.1 Company and that one of such company is now defunct, did not find favour.

10. The 2011 Rules, referred to in the impugned order, in Rule 5 thereof, in this regard provide as under:-

“5. Procedure for Examination of Application: The application under Rule 3 shall be examined with respect to the following, in addition to all other requirements under the Companies Act, 1956:-

- (a) *In the case of individual appointee, an undertaking from him that he/she will be in the exclusive employment of the company and will not hold a place of profit in any other company.*

- (b) *The monetary value of all allowances and perquisites and of total remuneration package (monthly/annually proposed to be paid to the appointee and details of the services that will be rendered by him to the company.*
- (c) *Details of shareholding pattern particularly the shareholding of the directors along with his/her/their relatives, the public holding, institutional holding (each institution separately) and the quantum of dividend paid by the company during the last three preceding financial years.*
- (d) *Details of the educational qualification/experience, pay scale, allowances and other benefits of similarly placed executives.*
- (e) *In case of the appointment of a relative, an undertaking from the Director/Company Secretary of the company that the similarly placed employees are getting the comparable salary.*
- (f) *List and particulars of the employees who are in receipt of remuneration of Rs.2,50,000/- or more per month.*
- (g) *The total number of relatives of all the Directors either appointed as Manager/Whole time Director, Manager or in any other position in the company, the total remuneration paid to all of them altogether as a percentage of profit as calculated for the purpose of Section 198 of the Companies Act, 1956.”*

11. I may in this regard further notice that the respondent, on 28th January, 2014, had sought from the petitioners the particulars with respect to the requirements specified in Clauses (b) to (g) of Rule 5 supra as well as the following other particulars:-

- “i. Shareholding pattern particularly the shareholding of the directors along with his/her/their relatives, the public holding, institutional holding (each institution separately).*
- ii. An undertaking from the Director/Company Secretary of the company that the similarly placed employees are getting the comparable salary.*
- iii. List/Particulars of the employees who are in receipt of remuneration of Rs.2,50,000/- per month or more along with their designation, level/grade in the organization, educational qualifications, experience and remuneration paid each of them along with relevant period.*
- iv. Whether the Selection Committee have been attended by a Member outside expert of the Company. If so, the details thereof along with minutes / resolution.*
- v. List of similarly placed employees or executives other than the relatives of the Director in the Company.*
- vi. Hierarchical organizational structure of the company.*

- vii. *The monetary value of all allowances and perquisites and of total remuneration package (monthly/annually) proposed to be paid to the appointee and details of the services that will be rendered by him to the company.*
- viii. *Whether appointee is working as a director in any other company. If so, details thereof. If not, a certificate to that effect from a Chartered Accountant/Company Secretary in whole time practice.”*

and which were furnished by the petitioners and with respect whereto nothing has been observed in the impugned order. Presumably the respondent was fully satisfied on all the aforesaid aspects.

12. It is the contention of the senior counsel for the petitioners that the only requirement of Rule 5(a) of the 2011 Rules is that the appointee has to be in the exclusive employment of the Company and is not to hold a place of profit in any other company.

13. It is further contended that the expression “place of profit” has been defined in Section 314(3) of the Companies Act, 1956 as under:-

“(3) Any office or place shall be deemed to be an office or place of profit under the company within the meaning of this section-

(a) in case the office or place is held by a

director, if the director holding it obtains from the company anything by way of remuneration over and above the remuneration to which he is entitled as such director whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise;

(b) in case the office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it obtains from the company anything by way of remuneration whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise.”

It is argued that the appointment of the petitioner no.2 as a Director in three other companies belonging to the same group as the petitioner no.1 Company, in a non-executive and non-remunerative position thus cannot be said to be not meeting the requirements of Rule 5(a) supra.

14. The counsel for the respondent, besides supporting the reasoning given in the impugned order, has also objected to the territorial jurisdiction of this Court. It is contended that under Section 10 of the 1956 Act the High Court has to be the High Court within whose jurisdiction the Company has a registered office and the petitioner no.1 Company has its registered office at Kanpur and thus this Court would not be the Court of competent jurisdiction to entertain the present petition. Else, on enquiry, on what basis it has been

observed in the impugned order that the ‘respondent has been following the principle that the individual appointee has to be under exclusive appointment of the company and cannot get around the provision by serving in a non-executive non-remunerative position in other companies’, he states that there is nothing further besides the Rules aforesaid.

15. As far as the objection to the territorial jurisdiction of this Court is concerned, the senior counsel for the petitioner has contended that the hearing preceding the impugned order took place in Delhi and the impugned order has been passed at Delhi and this Court would have territorial jurisdiction. On enquiry it is also informed that no such objection as to territorial jurisdiction was taken at the time the earlier writ petition filed by the petitioner was entertained in this Court.

16. The counsel for the respondent however states that the occasion for taking such objection did not arise since in the earlier petition a direction was sought to the authority situated at Delhi for hearing the petition.

17. However the latter contention is not found to have any merit since the challenge in the earlier writ petition was also to a similar order and which

was set aside on the ground of having been passed without complying with the principles of natural justice.

18. As far as the reference to Section 10 of the 1956 Act is concerned, the same prescribes the High Court having jurisdiction under that Act i.e. under the Companies Act i.e. for availing the remedies provided thereunder. Admittedly, against the impugned order there is no remedy under the 1956 Act and the petitioner has approached this Court in exercise of jurisdiction under Article 226 of the Constitution of India and on the parameters whereof this Court would certainly have the territorial jurisdiction to entertain the petition.

19. I am unable to find any merit in the reasoning given in the impugned order for denial of permission from 1st October, 2013 to 31st March, 2014. Even otherwise, the respondent, on its own cannot adopt or start following a 'principle', without any basis therefor and particularly when the decision of the application of the instant nature is to be governed by the statutory Rules and which 'principle' does not find any basis in the said Rules. It is not the case of the respondent that the said principle is based on any other provision of the 1956 Act or any other law / rule / regulation.

20. The prohibition contained in Section 314(1)(b) of the 1956 Act is against the relative of a Director of a company holding a office or place of profit, carrying monthly remuneration beyond the prescribed limits, in the company, save with the approval of the Central Government. Section 314(3) defines a office or place of profit for the purposes of the said Section as an office or place earning remuneration whether by way of salary, fees, commission, perquisites, the right to occupy free of rent any premises as a residence or otherwise. Thus the position of the Executive President (Commercial) in the petitioner no.1 Company carrying remuneration beyond the prescribed limits would be an office or place of profit in the petitioner no.1 Company and the petitioner no.2 being a relative of a Director of the petitioner no.1 Company cannot hold the said position without approval of Central Government.

21. The 2011 Rules, (i) in Rule 3 provide that no appointment for an office or place of profit in a company shall take effect unless approved by the Central Government; (ii) in Rule 4 provide the method of selection of relatives of Directors to hold a place or office of profit in the company; and, (iii) in Rule 5 provide the procedure for examination of the application. Rule 5(a) *inter alia* requires the Central Government to, before granting such

approval, obtain an undertaking from the appointee that he/she will be in the exclusive employment of the company and will not hold a place of profit in any other company.

22. It is not the case of the respondent that the petitioner no.2 has not furnished an undertaking in terms of Rule 5(a). It is also not the case of the respondent that the petitioner no.2 in the past, at any time since his such employment with the petitioner no.1 Company in the year 2004, has been holding a place of profit in any other company. It is also not the case of the respondent that the petitioner no.2 now is holding a place of profit in any other company besides the petitioner no.1 Company. All that the respondent in the impugned order states is that the petitioner no.2 is holding the position of a Director in three other companies and is thus not in the exclusive appointment of the petitioner no.1 Company.

23. Rule 5(a) undoubtedly uses the expression “exclusive employment of the company” but further proceeds to state that the appointee “will not hold a place of profit in any other company”.

24. The question which arises is whether on account of the petitioner no.2 being a Director in other companies can be said to be not in the exclusive

employment of the petitioner no.1 Company or holding a place of profit in the other companies.

25. The word ‘employee’ or ‘employment’ is not found defined, neither in the 1956 Act nor in the 2013 Act. While the former defines Director as including any person occupying the position of Director by whatever name called, the latter defines Director as meaning a Director appointed to the Board of a Company. Else, the word ‘employee’ and ‘employment’ have definite connotation. Black’s Law Dictionary 8th Edition (i) defines ‘employee’ as a person who works in the service of another person under an express or implied contract of hire under which the employer has the right to control the details of work performance; and, (ii) defines ‘employment’ as relationship between master and servant. Looked at in this light, a Director per se, without a contract of employment with the company, cannot be said to be an employee of the company.

26. High Court of Bombay, in ***CIT Vs. Lady Navajbai R. J. Tata*** (1947) 15 ITR 8 Bombay, held that under the English cases, a Director of a company is not a servant of the company and the fees he receives is by way of gratuity; but that does not prevent a Director from entering into a contractual relationship with the company, so that, quiet apart from his

office of Director, he becomes entitled to remuneration as an employee of the company.

27. Justice C.K. Thakker, in the Supreme Court, while dealing with an application under Section 11 of the Arbitration and Conciliation Act, 1996, in *M/s Comed Chemicals Ltd. Vs. C.N. Ramchand* (2009) 1 SCC 91 quoted with approval Gower and Davies' Principles of Modern Company Law, (17th Edn. pp. 370-76) dealing with duties of Director viz-a-viz as an employee of the Company and making it clear that a Director per se cannot be said to be an employee or servant of the Company.

28. Similarly in *Employees' State Insurance Company Vs. Apex Engineering Private Limited* (1998) 1 SCC 86 it was reiterated that a Director of a company is not a servant but an agent inasmuch as the company cannot act in its person but has only to act through Directors who qua the company have the relationship of an agent to its principal, though a Managing Director could have a dual capacity, both as a Director and as an employee, depending upon the nature of work and the terms of his employment.

29. What thus emerges is that depending upon the facts of the case, a Director may also be an employee of the company.

30. As far as the second limb of Rule 5(a) supra i.e 'place of profit in any other company' is concerned, as per Section 314(3) of the 1956 Act, a Director would be said to be holding a place of profit in the company only if he obtains from the company anything by way of remuneration over and above the remuneration to which he is entitled as such Director, whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise. Thus being a Director in a company does not amount to holding a place of profit in the company.

31. The consistent view of the Courts in *Canara Workshops Ltd. Vs. Union of India* (1966) 36 Comp. Cas 553 (Kar), *Firestone Tyre and Rubber Co. Vs. Synthetics and Chemicals Ltd.* (1971) 41 Comp. Cases 377 (Bom), *A.R. Sudarsanam Vs. Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd.* MANU/TN/0002/1982 and *Ram Pershad Vs. CIT, Delhi* (1972) 2 SCC 696 is that remuneration payable as a Director of a company is not office of profit. Justice D.P. Madon speaking for the Bombay High Court in the *Firestone Tyre and Rubber Co.* supra held that the object underlying Section 314 is to prevent a Director or his relative

from holding any office or place of profit carrying a total monthly remuneration beyond the prescribed limits under the company and thereby put in his pocket directly or indirectly additional profit over and above the remuneration to which he is entitled as such Director, without obtaining the requisite permission. Similarly in fact the Madras High Court in the **A.R. Sudarsanam** supra clearly held that a Director cannot be said to hold any office or place of profit if he should receive the remuneration to which he is entitled as such Director; on the other hand he will be said to hold an office or place of profit only when, besides the remuneration to which he is entitled as such Director, he obtains from the company a remuneration such as salary, fees, commission, perquisites.

32. It thus follows that the petitioner no.2, from the factum simplicitor of serving at Board level in other companies could not have been held to be in the employment of those companies, for it to be said that he could not be in the exclusive employment of the petitioner no.1 Company and could not have been on this ground refused appointment in the petitioner no.1 Company. Similarly, without the petitioner no.2 receiving any other emoluments from other companies in which he was/is a Director, it could not be said that he was/is holding any office of profit therein.

33. I may notice that though the impugned order reasons that the provisions of Section 314 cannot be got around by serving a non-executive/non-remunerative position in other companies but does not state that any other inquiry was done by the respondent or it was found that the petitioner no.2 though stated to be serving in non-executive and non-remunerative position in other companies but was devoting his time and energy thereto. Thus, though the reasoning may be correct if supported by the facts but *de hors* a factual finding is contrary to the statutory mandate. The statutory mandate is that being a Director in a non-remunerative and non-executive position in other companies does not amount to being in employment of those companies or holding a place of profit in those companies.

34. I am therefore of the opinion that the denial of approval by the respondent to the petitioners is erroneous.

35. There is another aspect of the matter. The petitioner no.2, as aforesaid, has been in the employment of the petitioner no.1 Company since the year 2004 i.e. for nearly nine years prior to the period for which approval has been denied i.e. 1st October, 2013 to 1st April, 2014 and after 1st April, 2014 no approval is required. The petitioner no.2 has already served the petitioner

no.1 Company for the period 1st October, 2013 to 31st March, 2014 and received remuneration therefor. He is stated to be in employment w.e.f. 1st April, 2014 also. If the impugned order were to be upheld, the same would entail requiring the petitioner no.2 to refund the emoluments already received by him from the petitioner no.1 company to the petitioner no.1 company and which may affect the relationship between the two and which may ultimately affect the functioning of the petitioner no.1 Company. The same also, in my view, is a relevant factor to be kept in mind.

36. The impugned order thus, to the extent denying the approval for the period from 1st October, 2013 to 31st March, 2014, cannot be sustained and is set aside. Axiomatically, the approval for the said period stands granted to the petitioners.

The petition is disposed of.

No costs.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 17, 2015

‘pp’..

(corrected and released on 9th December, 2015).