

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

NOTICE OF MOTION NO.1136 OF 2017

IN

SUIT NO.391 OF 2017

Ritu Prakash Desai And Another ... Applicants/Plaintiffs

In the matter between :

Ritu Prakash Desai And Another ... Plaintiffs

Versus

The Willingdon Sports Club And Another ... Defendants

• • • • •

Mr. N.H. Seervai, Senior Advocate a/w Mr.Akash Rebello And Himank Singh i/b Vidhii Partners for the Plaintiffs.

Mr. Darius Khambata, Senior Advocate a/w Mustafa Doctor, Senior Advocate, Ms. Naira Jejeebhoy, Mr. Hetal Thakore, Ms. Jyoti Ghag And Kunal Parekh i/b Thakore Jariwala & Associates for the Defendants.

.....

CORAM : S.C.GUPTE, J.

DATE : 19 JULY 2017

P.C. :

. This Notice of Motion is taken out in a suit filed by the Plaintiffs, who are respectively a member of Defendant No.1 Sports Club and her spouse, against the club and its Balloting and disciplinary committee, Defendant No.2 to the present suit. The Club has initiated disciplinary proceedings against the Plaintiffs, through the committee. The grievance of the Plaintiffs is that the committee has denied legal representation to them in the proceedings, relying on Rule 32(f)(iv) of the Rules and Bye-laws of the Club. The suit seeks a declaration that Rule 32(f)(iv) is void and *non*

est in law and not enforceable against the Plaintiffs and a perpetual injunction restraining the Defendants from prohibiting the Plaintiffs to be represented through their Advocate in the disciplinary proceedings.

2 On a sexual harassment complaint made by a fellow member of the club against Plaintiff No.2, the Balloting and Disciplinary Committee of the club has issued a show cause notice to Plaintiff No.1, who is the spouse of Plaintiff No.2 and a member of the club, and initiated a disciplinary inquiry pursuant of such notice. Rule 32(f)(iv) of Rules and Bye-laws of the Club, on the basis of which legal representation has been denied to the Plaintiffs, provides that : *“No member shall have the right to be represented by an Advocate or a representative at any disciplinary proceedings.”* It is the submission of Mr. Seervai, learned Senior Counsel appearing for the Plaintiffs, that the subject rule is treated by the club not as a directory rule, but as a mandatory rule, which prohibits legal representation to the member, who is called upon to show cause in a disciplinary inquiry. Relying on the decision of the Supreme Court in the case of **Union of India Vs. Tulsiram Patel**¹, it is submitted by learned Counsel that principles of natural justice apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of 'State' in Article 12, is charged with the duty of deciding a matter. Learned Counsel submits that in such a case principles of natural justice require that such body of men must decide the matter fairly and impartially and that includes allowing the delinquent a proper opportunity to show cause against the charge levied against him. Learned Counsel accepts that it may be permissible in a given case not to allow a lawyer to represent the

1 (1985) 3 Supreme Court Cases 398

member inquired against, but the rule of the club, which completely prohibits any legal representation whatsoever to the member in the matter of a disciplinary inquiry, certainly offends the rules of the natural justice. Learned Counsel submits that this is particularly so, when the disciplinary committee itself comprises of legal practitioners, as is the case in the present matter. Relying on the judgment of the Court of Appeal in the case of **Enderby Town Football Club Ltd Vs. Football Association Ltd**², learned Counsel submits that a tribunal may well exercise its discretion and decline legal representation, but to fetter its discretion by rigid bonds would be impermissible. Relying on the Scottish judgment in the case of **Wiles Vs. Bothwell Castle Golf Club**³, learned Counsel submits that whatever may be the principles of club law enunciated by older cases, the present day courts must recognize the nature of a social or sporting club, which has undergone important changes over the years, such clubs now being often hubs around which the social and business lives of their members revolve; Courts should now be more ready to intervene even on procedural matters, where they earlier did not. Learned Counsel submits that the impugned rule of the club in so far as it bars legal representation altogether must be held to be bad in law and struck down. Lastly, learned Counsel submits that in the alternative, for the very same reasons, the rule should be so interpreted, or possibly read down, as to deny legal representation as of right, whilst, at the same time, preserve the discretion of the disciplinary committee to allow such representation in a suitable case.

² Chancery Division Decision [1971] Pg.591

³ 2005 S.L.T. 785

3 Mr. Khambatta, learned Senior Counsel for the Defendants, counters these submissions *inter alia* citing the law laid down by the Supreme Court in the case of **T.P. Daver Vs. Lodge Victoria No.363**.⁴ Relying on this law, learned Counsel submits that any power in a club to expel its member is sourced in the contract amongst the members and with the club. It is submitted that any person who joins an association or a club agrees to be governed by the rules of such association or club, under which he may be expelled and has no right of redress against such expulsion, so long as it is according to the rules and in good faith. Relying on the judgment of Calcutta High Court in the case of **M.S. Ezra Vs. Mahendra Benerje**⁵, learned Counsel further submits that the Court cannot sit in appeal and scrutinize any inquiry or, for that matter, the validity of any rule of expulsion, such rule merely being an embodiment of the contract between the members. Learned Counsel does not dispute that natural justice ought to be part of any disciplinary inquiry even under the club law, but the right to legal representation, submits Counsel, is not necessarily part of natural justice, particularly when the rules of the club prohibit such representation.

4 It is not a matter of dispute that in the present case, the disciplinary inquiry is initiated on a complaint filed by a fellow member of the club. The complainant member has even lodged her complaint, first, with the Managing Committee and, upon finding its reply unsatisfactory, approached the Balloting and Disciplinary Committee of the club. The requirement of Rule 52 of the Rules and Bye-laws of the club are clearly met. The Balloting and Disciplinary Committee, for its part, has initiated a disciplinary inquiry by issuance of a show cause notice. This is also in

4

5 (1946-47) 51 CWN 612

accordance with the Rules and Bye-laws of the club. The only question before the Court is, whether, in the face of a clear stipulation contained in Rule 32(f)(iv) of the Rules and Bye-laws, which provide that no member shall have a right to be represented by an Advocate or any other representative, a right to legal representation can be said to be a part of natural justice and if so, whether the Rule should be struck down or held inapplicable or, at least, read down to mean that it is merely directory and not mandatory.

5 As held by Maugham, J. in the celebrated case of **Macleane Vs. The Workers' Union**⁶, the jurisdiction of the Courts in regard to domestic tribunals- a phrase which may conveniently be used to include the committees or councils or members of trade unions, of members' clubs, and of professional bodies, while acting in a quasi-judicial capacity- is clearly of a limited nature. Where the tribunal is the result of rules adopted by persons who have formed the association or club, it is reasonably clear that the rights of a member against the club or other members of the club, must depend simply on the contract, the material terms of which must be found in the rules, under which he may be expelled or reprimanded or suspended. He has no legal right of redressal if he be so expelled or reprimanded or suspended according to rules, however unfair or unjust the rules themselves or the action of the expelling tribunal may be, provided of course that it acts in good faith. These observations in **Macleane's** case were cited with approval by the Supreme Court in the case of **T.P. Daver** (supra). As held by the Supreme Court in **T.P. Daver's** case, the contractual origin of the rule of expulsion has its corollary in the cognate rule that in

6 Chancery Division Decision [1929] Pg.602

expelling a member the conditions laid down in the Rules must be strictly complied with. It is equally corollary of the same rule that so long as the rules of expulsion or disciplinary inquiry are strictly complied with, the person, who is under expulsion or disciplinary inquiry, has no cause to complain, provided, however, that the action is initiated and conducted in good faith, for there is no excuse for bad faith in any view of the matter.

6 There is no manner of doubt that the Balloting and Disciplinary Committee of the club, in the present case, is acting in accordance with the rules, namely, Rule No.32(f)(iv), whilst refusing to allow legal representation to the Plaintiffs. An attempt is made to canvass the point that the rule, at any rate, must be read as directory and not a mandatory rule. It is submitted that, on its own terms, the rule does not prohibit legal representation for all times and in all cases. In any event, it is submitted that considering the requirements of natural justice, which must include an adequate opportunity of representation, if necessary, through legal counsel, depending on the nature and circumstances of the case, the rule must be so read. It is sufficient for the present to note that both the club and the member, who is under the disciplinary inquiry, have so far proceeded on the footing that that the rule is in mandatory terms. Even otherwise, considering the language of the rule and the setting in which it finds place, it is *prima facie* apparent that the rule prohibits legal representation to the delinquent member and if the committee considers the rule in that light, at least at this *prima facie* stage, no fault can be found with it.

7 Coming now to the question as to whether the rule, if held mandatory, is bad in law and inoperative, Mr. Seervai refers to the

judgment of Lord Denning M.R. in the case of **Enderby Town Football Club Ltd** (supra) to support his case that a rule which altogether prohibits legal representation to a member in a disciplinary inquiry is null and void. That was a case where an organization known as 'The Football Association Ltd.' controlled association football played between county associations affiliated to it. County associations were not limited companies, but unincorporated associations of individual clubs. One such individual club was Enderby Town Football Club, the plaintiff, which was fined and censured by their county association. The club appealed to the Football Association. The club's solicitor asked for permission for the club to be represented by legal counsel at the hearing of the appeal. Relying on a certain rule, Rule 38(b) of the Football Association, which excluded legal representation save where the lawyer was either chairman or secretary of the club to be represented, the permission was denied. Lord Denning M.R. considered the question whether a party charged before a domestic tribunal was entitled as of right to be legally represented. The Learned Judge, at the outset, accepted that much depended on what the rules said about it. *“When the rules say nothing, a party has no absolute right to be legally represented; It is a matter for the discretion of the tribunal. They are the masters of their own procedure and, if they, in the proper exercise of their discretion, decline to allow legal representation, the Courts will not interfere.”* These dicta, laid down in the case of **Collier V. Hicks**⁷, were held by Lord Denning M.R. to be applicable to domestic tribunals. The Learned Judge, however, went on to say :

⁷ (1931) 2 B & Ad.663

“In many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game. But I would emphasize that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: “We will never allow anyone to have a lawyer to appear for him.” The tribunal must be ready, in a proper case, to allow it.”

Much emphasis was laid by Mr. Seervai on the observations that no absolute rule can be laid down to fetter the discretion of the tribunal. It is, however, important to note that these observations are in the context of a situation “when the rules say nothing”. When the rules say nothing, the tribunal should not fetter its discretion by an absolute mandate. It is an altogether different matter, where rules actually provide otherwise, that is to say, when rules actually prohibit legal representation in a disciplinary inquiry. Learned Counsel, however, submits that even this aspect has been considered by Lord Denning M.R. in the case of **Enderby Town Football Club** (supra). The learned Judge did consider as to whether or not a court of law has any power to go beyond the wording of the rule and consider its validity. The learned Judge held that rules of a body like this are often said to be a contract. But that is so only as a matter of legal theory. Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code - a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such

regulations, though said to be a contract, are subject to the control of the courts. After making these general observations, the learned Judge went on to consider some examples of cases where such control is exercised by the Courts. If, for example, such regulations are in unreasonable restraint of trade, they are invalid; if they seek to oust the jurisdiction of the court, they are invalid; if they unreasonably shut out a man from his right to work, they are invalid. In the same vein, the learned Judge went on to add that if they lay down a procedure which is contrary to the principles of natural justice, they are invalid. So far so good. The real question is, what is meant here by principles of natural justice. The judgments of other brother Judges, Fenton Atkinson L.J. and Cairns L.J., in **Enderby Town Football Club** (supra) do throw light on this aspect. Atkinson L.J. framed the question thus : whether the rule so offends against 'the rules of natural justice' that it must be disregarded and treated as invalid. And on these 'rules of natural justice', Atkinson L.J. quoted the words of **Privy Council in Ceylon University Vs. Fernando**⁸ as follows :

“What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more.”

Atkinson L.J. also proceeded to consider whether the particular rule against legal representation in that case, which anyway applied to both parties to the dispute, could be called in question. The learned Judge held that the rule enables a decision to be given speedily without either party to

8 [1960] 1 W.L.R. 223, 232

the dispute being at the risk of having to pay a heavy bill of costs and there was nothing so unfair in the rule so as to offend against the rules of natural justice. Cairns L.J. also agreed with this, stating that to deny representation in a matter like this was not to allow administrative convenience to override the claims of justice, but it was in the interest of justice and not only of administrative convenience that a decision should be arrived at quickly and cheaply. Where the tribunal is composed of intelligent laymen, who have knowledge of the sport or business concerned, the employment of lawyers is likely to lengthen proceedings and greatly increase even the expense without any certainty of bringing about a fairer decision.

8 This position was also explained in **Maclean's** case (*supra*), where the Appeal Court held that if the rules postulate an inquiry, what is meant thereby is a reasonable opportunity to the noticee of being heard. The law was reiterated in the following words :

“The phrase, “the principles of natural justice,” can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation. On that point there is no difficulty. Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a *lis* between two persons, neither of them should sit on the tribunal. But when it is sought to lay down elaborate rules, taken from decisions as to Courts of law, and to apply them in such a case as the present, I think it is prudent to remember that these more or less artificial

principles have no application except so far as they can be derived from a fair construction of the rules, and that the implication can only be made if it is clear that the parties, who are laymen and not lawyers, must have intended it.”

Principles of natural justice, in other words, do not further imply that the chance of defence or explanation must necessarily include legal representation.

9 This position is reiterated by our Supreme Court in a number of cases under service law in connection with departmental inquiries. One of the latest judgments on the point is the case of **D.G. Railway Protection Force Vs. K. Raghuram Babu**⁹, where the law is stated in the following words :

“9. It is well settled that ordinarily in a domestic/departmental enquiry the person accused of misconduct has to conduct his own case vide *N. Nalindi Vs. Tata Locomotive And Engg. Co. Ltd.*¹⁰ Such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer. It is only if there is some rule which permits the accused to be represented by someone else, that he can claim to be so represented in an inquiry vide *Brooke Bond India (P) Ltd. Vs. Subba Raman*¹¹.

10. Similarly, in *Cipla Ltd Vs. Ripu Daman Bhanot*¹² it was held by this Court that representation could not be claimed as of right. This decision followed the earlier decision *Bharat Petroleum Corpn.*

9 (2008) 4 Supreme Court Cases 406

10 AIR 1960 SC 914

11 (1961) 2 LLJ 417 (SC)

12 (1999) 4 SCC 188

*Ltd. Vs. Maharashtra General Kamgar Union*¹³ in which the whole case law has been reviewed by this Court.”

10 Mr. Seervai, however, points out that the Balloting and Disciplinary Committee itself consists of some lawyers sitting on it. That may be. For all one knows, it may be a matter of co-incidence. But whether or not it is a coincidence, that does not mean that fair-play is being denied to the Plaintiff by avoiding legal representation. This is not an inquiry where the Plaintiffs and the club are adversaries. It is really a disciplinary inquiry initiated by the club on a complaint by a fellow member. If at all, the *lis* is between two members, where the Balloting and Disciplinary Committee is really in the position of judges. If the judges were to include a legally trained mind as part of them, so be it. That does not mean that the tribunal is any worse, for that reason, than the tribunal of mere laymen.

11 In the light of the foregoing discussion, there is clearly no *prima facie* merit in the Plaintiffs' case either that the rule is bad in law and inoperative or that it must be necessarily so read as to allow a discretion to the Committee to allow legal representation in an appropriate case.

12 Accordingly, there is no merit in the Notice of Motion. The Notice of Motion is dismissed. Costs to be costs in the cause.

(S.C. GUPTE, J.)

¹³ (1999) 1 SCC 626