

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Tuesday, the Fourth day of September Two Thousand Eighteen

PRESENT

THE HON`BLE MR.JUSTICE S.MANIKUMAR

and

THE HON`BLE MR.JUSTICE SUBRAMONIUM PRASAD

WMP.No.26661 of 2018

in WP.No.22813 of 2018

G.VASUDEVAN,

[PETITIONER]

Vs

1 UNION OF INDIA, REP BY ITS
SECRETARY, MINISTRY OF CORPORATE
AFFAIRS, SHASTRI BHAVAN,
DR.RAJENDRA PRASAD ROAD,
NEW DELHI 110 001

[RESPONDENTS]

2 UNION OF INDIA, REP BY ITS
SECRETARY, MINISTRY OF LAW AND JUSTICE,
SHASTRI BHAVAN, DR.RAJENDRA PRASAD ROAD,
NEW DELHI 110 001

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant an Interim stay of the operation of the Proviso in section 167(1) (a) of the companies Act, 2013 as inserted vide the companies (Amendment) Act, 2017 (in WMP.No.26661/2018) pending disposal of the above WP.No.22813/2018.

Order : This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.R.RAJESH, Advocate for the petitioner and of M/S.T.L.THIRUMALAISAMY, Advocate on behalf of the respondents the court made the following order:-

(Order of the Court was made by S.Manikumar,J

Introduction of proviso, in Section 167 (1) (a) of the Companies Act, 2013, by the Companies (Amendment) Act, 2017, has been challenged on the ground that it takes away the fundamental rights, under Article 19 (1) (g) of a person, to continue as a Director of other Companies, which has not committed any default, as stipulated, under Section 164 (2) of the Companies Act.

2.We have heard Mr.R.Rajesh, learned counsel for the petitioner, who invited the attention of this Court, to the provisions of 167 (1) of the Companies Act, 1956, before and after the insertion of the proviso, to the above said Section.

3.Courts have consistently held that presumption is in favour of constitutionality of the enactment. Reference can be made to few decisions of the Hon'ble Supreme Court.

(i) A Full Bench of the Hon'ble Supreme Court in Shri Ram Krishna Dalmia v. Shri Justice S.R.Tendolkar reported in AIR 1958 SC 538 = 1959 SCR 279, has carved out the principles as follows:

"(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

(ii) In Mohd. Hanif Quareshi v. The State of Bihar reported in 1958 AIR 731, the Hon'ble Supreme Court observed as follows :-

"The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

(iii) In *Mahant Moti Das v. S.P.Sahi*, the Special Officer In Charge of Hindu Religious Trust & Ors. reported in AIR 1959 SC 942, the Hon'ble Supreme Court, held as follows:

"The decisions of this Court further establish that there is a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest....."

(iv) In *State of Uttar Pradesh v. Kartar Singh* reported in AIR 1964 SC 1135, the Constitution Bench of the Hon'ble Supreme Court held that where a party seeks to impeach the validity of a rule on the ground of such rule offending Article 14, the burden is on him to plead and prove infirmity. This Court said :

"....., if the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any apriori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Article 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations. That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rules offend Art.

14 the burden is on him to plead and prove the infirmity is too well established to need elaboration. If, therefore, the respondent desired to challenge the validity of the rule on the ground either of its unreasonableness or its discriminatory nature, he had to lay a foundation for it by setting out the facts necessary to sustain such a plea and adduce cogent and convincing evidence to make out his case, for there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification of the zones and the prescription of the minimum standards to each zone, and where we have a rule framed with the assistance of a committee containing experts such as the one constituted under Section 3 of the Act, that presumption is strong, if not overwhelming....."

(v) In *A.C. Aggarwal, Sub-Divisional Magistrate, Delhi v. Mst. Ram Kali* reported in AIR 1968 SC 1, the Constitution Bench of the Hon'ble Supreme Court reiterated the legal position thus :

".....The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

(vi) In *Pathumma and others v. State of Kerala* reported in AIR 1978 SC 771 = 1978 SCR (2) 537, a Constitutional Bench of the Hon'ble Supreme Court held as follows:

"It is obvious that the legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weak-or sections of the society and for the improvement of the lot of poor people. The Court will therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same."

(vii) In *M.L. Kamra v. Chairman-Cum-Managing Director, New India Assurance Co. Ltd.*, reported in 1992 AIR 1072 : 1992 SCR (1) 220, the Hon'ble Supreme Court held as follows:

"It is settled law that there is a presumption of constitutionality of the rule. The court ought not to interpret the statutory provisions, unless compelled by their language, in such a manner as would involve its unconstitutionality, Since the legislature of the rule making authority is presumed to enact a law which does not contravene or violate the constitutional provisions. Therefore, there is a presumption in favour of constitutionality of a legislation or statutory rule unless ex facie it violates the fundamental rights guaranteed under Part III of the constitution."

(viii) In Peoples Union for Civil Liberties v. Union of India reported in 2004 (2) SCC 476, the Hon'ble Supreme Court held that a statute carries with it a presumption of constitutionality and such a presumption extends also to a law which has been enacted for imposing reasonable restrictions in the fundamental right. It is further held that a further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily.

(ix) In Karnataka Bank Limited v. State of Andhra Pradesh reported in (2008) 2 SCC 254 , the Hon'ble Supreme Court held as follows:

"19. The rules that guide the constitutional courts in discharging their solemn duty to declare laws passed by a legislature unconstitutional are well known. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity". Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of law upheld. In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it. (See State of Bombay v. F.N.Balsara [AIR 1951 SC 318])"

(x) In Government Of Andhra Pradesh & Ors vs Smt.P.Laxmi Devi reported in 2008 (4) SCC 720, the Hon'ble Supreme Court has considered few decisions, on the presumption in favour of the constitutionality, as follows:

"58. The U.S. Supreme Court enunciated the principle that there is a presumption in favour of the constitutionality of Statute, and the burden is always upon the person who attacks it to show that there has

been a clear transgression of a constitutional provision. This view was adopted by the Constitution Bench of this Court in Charanjit Lal Chowdhury v. Union of India and others [AIR 1951 SC 41 (para 10)], which observed:

"Prima facie, the argument appears to be a plausible one, but it requires a careful examination, and while examining it, two principles have to be borne in mind :

(1) that a law may be constitutional even though it relates to a single individual, in those cases where on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(2) that it is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A clear enunciation of this latter doctrine is to be found in *Middleton vs. Texas Power and L. Company*, (248 U.S. 152 and 157), in which the relevant passage runs as follows :

It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by expression and that its discriminations are based upon adequate grounds." and this view has been consistently followed thereafter.

59. Thus in *M/s. B.R. Enterprises vs. State of U.P. and others* AIR 1999 SC 1867 this Court observed :

"Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment, vide *Charanjit Lal Chaowdhury v. Union of India*, 1950 SCR 869: AIR 1951 SC 41); *State of Bombay v. F.N.Bulsara*, 1951 SCR 682: (AIR 1951 SC 318), *Mahant Moti Das v. S.P.Sahi* (AIR 1959 SC 942)".

The following passage in Seervai, Constitutional Law of India (3rd Edn.) page 119 found approval in Delhi Transport Corporation v. D.T.C.Mazdoor Congress, 1991 (Supp) 1 SCC 600 : (AIR 1991 SC 101). The Court held:

"Seervai in his book Constitutional Law of India (3rd Edn) has stated at page 119 that:

"the courts are guided by the following rules in discharging their solemn duty to declare laws passed by a legislature unconstitutional:

1) There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; 'to doubt the constitutionality of a law is to resolve it in favour of its validity'.

2) A statute cannot be declared unconstitutional merely because in the opinion of the court it violates one or more of the principles of liberty, of the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution" (emphasis supplied)

60. Similarly in Union of India v. Elphinstone Spinning and Weaving Co. Ltd., and another, AIR 2001 SC 724 (vide para 9) a Constitution Bench of this Court observed :

"There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates such as, those relating to fundamental rights is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution it must be allowed to stand as the true expression of the national will. Shell Company of Australia vs. Federal Commissioner of Taxation, 1931 AC 275 (Privy Council). The aforesaid principle, however, is subject to one exception that if a citizen is able to establish that the legislation has invaded his fundamental rights then the State must justify that the law is saved. It is also a cardinal rule of construction that if one construction being given the statute will become ultra vires the powers of the legislature whereas on another construction which may be open, the statute remains effective and operative, then the Court will prefer the latter, on the ground that the legislature is presumed not to have intended an excess of jurisdiction". (emphasis supplied)

61. In State of Bihar and others v. Bihar Distillery Ltd., AIR 1997 SC 1511 (vide para 18) a Constitution Bench of this Court observed :

"The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void."

62. The same view has been taken by the Constitution Bench of this Court in Hamdard Dawakhana and another v. Union of India, AIR 1960 SC 554 (vide para 9) which observed :

"Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people, that the laws it enacts are directed to problems which are made manifest by experience, and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. Charanjit Lal v. Union of India, 1950 SCR 869: (AIR 1951 SC 41); State of Bombay v. F.N.Baulsara, 1951 SCR 682 at p.708; (AIR 1951 SC 318 at p. 326); AIR 1959 SC 942."

(xi) In Namit Sharma vs Union Of India reported in 2013 (1) SCC 745, the Hon'ble Supreme Court, held as follows:

"46. To examine constitutionality of a statute in its correct perspective, we have to bear in mind certain fundamental principles as afore-recorded. There is presumption of constitutionality in favour of legislation. The Legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the constitutionality and shows that despite such presumption in favour of the legislation, it is unfair, unjust and unreasonable."

(xii) M/s. Innoventive Industries Ltd., 's case (cited supra), has also considered several authoritative pronouncements, under Article 142 of the Constitution of India, dealing with repugnancy between the Central and State laws. At Paragraph 50, the Hon'ble Supreme Court, culled out the preposition of law, as hereunder:

"i) Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.

ii) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

iii) The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

iv) Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy - care should be taken to see whether the two do not really operate in different fields qua different subject matters.

v) Repugnancy must exist in fact and not depend upon a mere possibility.

vi) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

vii) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

viii) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

ix) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

x) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by

the legislature of the State, by virtue of the operation of Article 254(2) proviso."

4. In the light of the above said judgments, though contention has been made that there is an infringement of fundamental right, guaranteed under Article 19 (1) (a), we are not inclined to grant interim stay of the operation of the proviso to Section 161 (a) of the Companies Act, 2013.

5. Accordingly, W.M.P.No.26661 of 2018 is dismissed.

-sd/-

04/09/2018

/ TRUE COPY /

Sub Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 THE SECRETARY,
UNION OF INDIA, MINISTRY OF CORPORATE
AFFAIRS, SHASTRI BHAVAN, DR.RAJENDRA PRASAD
ROAD, NEW DELHI 110 001

2 THE SECRETARY,
UNION OF INDIA, MINISTRY OF LAW AND JUSTICE,
SHASTRI BHAVAN, DR.RAJENDRA PRASAD
ROAD, NEW DELHI 110 001

C.C. to M/S.R.RAJESH Advocate on payment of necessary charges

C.C. to M/S.T.L.THIRUMALAISAMY, Advocate Sr.No.10540.

Order

in
WMP.26661/2018

in
WP.22813/2018

Date :04/09/2018

From 26.2.2001 the Registry is issuing certified
copies of the Interim Orders in this format
KP(12/09/2018)