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

Reserved on : 7th August, 2018

Date of Decision: 24th September, 2018

+ **CS (COMM) 1057/2018 & CAVs 697/2018, 698/2018, I.As. 10222/2018, 10223/2018, 10224/2018, 10225/2018**

RAVINDER SABHARWAL AND ANR.

..... Plaintiffs

Through: Mr. Rajshekhar Rao, Mr. Anuj Berry,
Mr. Abhay J.V., Mr. Malak Bhatt,
Ms. Apoorva Murali & Ms. Kruttika
Vijay, Advocates (M-9871792740)

versus

XAD INC. AND ORRS.

..... Defendants

Through: Mr. Sandeep Sethi, Senior Advocate
with Ms. Aananya Kumar, Mr.
Manish Jha, Ms. Pragya Chuahan,
Ms. Megha Kapoor, Advocates for D-
1 to 3 (M-9910627489).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Plaintiffs have filed the present suit seeking permanent injunction against the Defendants from conducting an Extraordinary General Meeting (*hereinafter* 'EGM') for removing the Plaintiffs. Plaintiff No.1 – Sh. Ravinder Sabharwal is a Director of XAD Software Pvt. Ltd. and was also the nominee share holder of 50% of the shares in the Defendant No.4. Plaintiff No.1 was one of the initial promoters and founders of Defendant No.4.

2. Defendant No.1 – XAD Inc. is a US based company which is the 100% beneficial share holder of XAD Software Pvt. Ltd. i.e. the entire share

holding of the said company is held for the benefit of XAD Inc. Defendants No.2 and 3 are the CEO and CFO of XAD Inc. One of the nominee Directors in Defendant No.4 is Plaintiff No.2 – Mr. Ajay Kumar Srivastava. The Defendant No.4 company is in effect run by the Board of Directors comprising of Plaintiffs No.1 and 2.

3. It is the case of the Plaintiffs that they are responsible for the day to day management of Defendant No.4, however, due to various disputes that arose in view of an employee, the relationship between the Plaintiffs and Defendants No.1, 2 and 3 had soured. It is the case of the Plaintiff that on 24th May, 2018 when Plaintiff No.1 reached the office, he was stopped by an ex-employee and the HR head from entering the office. He, thereafter, received an e-mail dated 24th May, 2018 signed by the said ex-employee – Mr. Manoj Mishra terminating the employment of Plaintiff No.1. There were e-mails and counter e-mails sent by the parties. The resignation of Plaintiff No.1 was sought by the Defendants which was refused by Plaintiff No.1. The allegations in the plaint is that the business of Defendant No.4 was sought to be hijacked into another company. On 30th May, 2018, the licence agreement entered into between XAD Inc. and Defendant No.4 was also terminated by XAD Inc. The said license agreement is subject matter of another suit being CS (COMM) 1048/2018 and has been disposed of by this Court by appointing a Sole Arbitrator – Justice Indermeet Kaur Kochar (Retired) under the aegis of Delhi International Arbitration Centre (*hereinafter 'DIAC'*).

4. A letter dated 30th June, 2018 was thereafter issued by Defendant No.2 herein, the CEO of Defendant No.4 seeking removal of Plaintiff Nos.1 and 2. Vide the said letter, an EGM was sought to be convened on 24th July,

2018. The present suit was therefore filed seeking an injunction against the Defendants from convening the EGM on 24th July, 2018 as also stay on termination of the Plaintiffs No.1 and 2 as Directors.

5. The case of the Plaintiffs is that the notice dated 30th June, 2018 is not in accordance with law as the requisite notice period has not been given to convene the EGM. Further, it is the grievance of the Plaintiffs that they are the promoters of Defendant no.4, and in fact Plaintiff No.1 was the non-rotational director of Defendant No.4 and therefore no termination also could have been issued against them.

6. On 3rd August, 2018, when the matter was listed before this Court, the same was adjourned to 7th August, 2018 to be heard along with CS (COMM) 1048/2018. On the said date, the counsel for the Caveators appeared and addressed their arguments. Accordingly, submissions have been heard from both sides.

7. The submission of Ld. Counsel for the Plaintiff – Mr. Rajshekhar Rao is that the notice issued calling for the EGM was not as per the law. The notice dated 30th June, 2018 sought to call for the EGM on 24th July, 2018. This notice was only received by the Plaintiffs on 13th July, 2018, and hence the requisite notice period of 14 days, for calling of the EGM was not provided. This according to the Ld. Counsel is not in accordance with Section 115 of the Companies Act, 2013 (*hereinafter*, ‘Companies Act’) read with Rule 23 of the Companies (Management and Administration) Rules, 2014. The notice dated 30th June, 2018 was duly replied to by the Plaintiffs on 17th July, 2018. Moreover, it was argued by Mr. Rao that the Articles of Association of Defendant No.4 governed the appointment of Directors. Section 152 of the Companies Act comes into play only if there is

no provision made in the Articles of Associations. According to him, as per the Articles of Association, Plaintiff no.1 was the first Director, and that too a non-rotational Director till he voluntarily resigns. According to Mr. Rao, therefore, the Articles of Association prevail over the provisions of the Companies Act. Thus, according to Mr. Rao, if a Director had to be removed, he had to be given reasonable opportunity of being heard under Section 169.

8. On the other hand, Mr. Sandeep Sethi, Ld. Senior Counsel for the Defendants submits that no injunction can be sought against the holding of an EGM. According to Mr. Sethi, Article 17 of the Articles of Association of the company by which the Plaintiff No.1 was appointed as a non-rotational Director was itself subject to the provisions of the Companies Act. Thus, the Defendant No.1 which was a 100% beneficial share holder had the right to call for an EGM. He further submits that a board meeting can be called and held within three months from the date of the notice at any point of time. He relies on the judgment of the Supreme Court in *Life Insurance Corporation v. Escorts Ltd. (1986) 1SCC 264* (hereinafter, '*Life Insurance Corporation*'). He also relies on *Jai Kumar Arya v. Chhaya Devi (2018) 142 CLA 365* (hereinafter, '*Jai Kumar Arya*') to argue that the reasons for removal are to be communicated to the Directors only in the meeting itself and not before.

9. This Court has heard the submissions of both sides. The relief prayed for in the suit is relevant and is extracted herein below:

“a. Grant a decree of permanent injunction against the Defendants from conducting an extra ordinary general meeting for removing the Plaintiffs as Directors;

- b. *Grant a decree of permanent injunction against the removal of Plaintiff No.1 from Defendant No.4;*
- c. *Grant a decree of permanent injunction against the removal of Plaintiff No.2 from Defendant No.4;*
- d. *Grant such other and further relief(s) in favour of the Plaintiff as this Hon'ble Court may deem fit and proper in the circumstances of the case."*

10. Thus, the only injunction sought for is against the conduct of an EGM and injunction against removal of Plaintiffs No.1 and 2 from the Board of Defendant No.4.

11. The Plaintiffs do not dispute that XAD Inc. is the 100% beneficial share holder of Defendant No.4. The EGM has been called as per Section 100 and such a meeting is to be governed under the provisions of the Companies Act and the Rules thereunder. There is no doubt that Plaintiff No.1 was one of the promoters of Defendant No.4 and was to be a non-rotational Director till he voluntarily resigns. Articles 17 and 18 of the Article of Association of the Defendant No.4 are set out herein below:

"17. Subject to the provisions of the Companies Act, 1956, the following shall be first Directors of the Company who shall be non-rotational Directors till they voluntarily resign:-

- 1. *Ravinder Pal Singh Sabharwal*
- 2. *Pradeep Kholia*

18. (a) The Company in general meeting shall have power at any time to appoint one or more persons as non-rotational Directors for such time and on such terms as they may be determined.

(b) The remaining Directors shall be appointed by the company in General Meeting and shall hold office till they resign or are removed

from office or are otherwise to be deemed to have vacated their office by virtue of any provision of law or these Articles, casual vacancies being filled up in accordance with the provisions mutatis mutandis of Section 262 of the Act.

(c) The Company may, from time to time, in General Meeting increase or reduce the number of Directors within the limits laid down in Article 16 and determine in what rotation such increased or reduced number shall go out of office.”

12. A perusal of the above Articles show that the continuation of Directorship of the Plaintiffs till they resign, is not unequivocal but is ‘*subject to the provisions of the Companies Act*’. The power of appointment of Directors in a company vests with the subscribers. In any event, such a power is one which vests purely with the share holders of the company and can be decided in an EGM. Calling of an EGM is the power of the share holders and a perusal of the notice dated 30th June, 2018 clearly shows that the said notice has been issued under Section 100 of the Companies Act. The notice clearly specifies the resolutions that are intended to be passed. The EGM was originally scheduled for 24th July, 2018 but was thereafter postponed. The Plaintiff herein objected that the EGM notice did not give the 14 days’ notice period which was required to be given as per law. The question as to whether an injunction can be passed against holding of an EGM has been settled by the Supreme Court in the decision of ***Life Insurance Corporation (supra)*** The Supreme Court in the said judgment has categorically held that the power to appoint Directors is with the holders of the majority of the stock. No injunction can be granted to restrain the holding of such a meeting. The observations of the Supreme Court are set out herein below:

“95. A Company is, in some respects, an institution like a State functioning under its 'basic Constitution' consisting of the Companies Act and the Memorandum of Association. Carrying the analogy of constitutional law a little further, Gower describes "the members in general meeting" and the directorate as the two primary organs of a company and compares them with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the Directors will be answerable to the 'Parliament' constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over the Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two-man companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the Directors the right to exercise all the company's powers except such as general law expressly provides must be exercised in general meeting. Of course, powers which are strictly legislative are not affected by the conferment of powers on the Directors as Section 31 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. But a perusal of the provisions of the Companies Act itself makes it clear that in many ways the position of the directorate vis-a-vis the company is more powerful than that of the Government vis-a-vis the Parliament. The strict theory of Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exercisable by the Directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the Directorate and appoint others in their place,

or alter the articles so as to restrict the powers of the Directors for the future. Gower himself recognises that the analogy of the legislature and the executive in relation to the members in general meeting and the Directors of a Company is an over-simplification and states "to some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution." As already noticed, the only effective way the members in general meeting can exercise their control over the directorate in a democratic manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a Director and appoint another.

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97.In the same case considering the question whether an injunction should be granted to restrain the holding of general meeting, one of the purposes of the meeting being the appointment of a committee to reorganize the management of the company, Cotton L.J. said:

"It is very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere if the majority of them think that the course taken by the Director, in a matter intra vires of the Directors, is not for the benefit of the company."

.....

100. Thus, we see that every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements, to call an extraordinary general meeting in accordance with the

provisions of the Companies Act. He cannot be restrained from calling a meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting. Nor are the reasons for the resolutions subject to judicial review. It is true that under Section 173(2) of the Companies Act, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each item of business to be transacted at the meeting including, in particular, the nature of the concern or the interest, if any, therein, of every director, the managing agent if any, the secretaries and treasurers, if any, and the manager, if any. This is a duty cast on the management to disclose, in an explanatory note, all material facts relating to the resolution coming up before the general meeting to enable the shareholders to form a judgment on the business before them. It does not require the shareholders calling a meeting to disclose the reasons for the resolutions which they propose to move at the meeting. The Life Insurance Corporation of India, as a shareholder of Escorts Limited, has the same right as every shareholder to call an extraordinary general meeting of the company for the purpose of moving a resolution to remove some Directors and appoint others in their place. The Life Insurance Corporation of India cannot be restrained from doing so nor is it bound to disclose its reasons for moving the resolutions.”

13. As per this binding dictum, there can be no injunction restraining holding of an EGM. The majority share holders have the power to appoint Directors and the power to regulate them by passing a resolution for removal. The reasons for passing of a particular resolution need not be disclosed in the notice calling for the EGM. Also, passing of the resolution and the reasons thereof are not subject to judicial review. Thus, in the present suit what the Plaintiffs only intend to seek is an injunction against calling of the EGM.

14. Even the reasons for removal of the Director, as per the settled pronouncement of the Division Bench in **Jai Kumar Arya (supra)**, following the judgment of the Supreme Court in **Life Insurance Corporation (supra)** is also that the reasons have to be communicated only in the meeting and not before. Observations of the Division Bench in para 167 are set out herein below:

“167. In view of the law laid down by the Supreme Court in L.I.C. of India (supra), we, with great respect, are unable to subscribe to the view, expressed by the Kerala High Court in Queens Kuries (supra), that the reasons for the proposal to remove the director from the Company had necessarily to be spelt out in the Special Notice issued under Section 115 of the Act. In this context, reference may usefully be made to a judgement of a learned Single Judge of the High Court of Karnataka in Sri B. G. Somayaji v Karnataka Bank Ltd, AIR 1995 Kant 344, which was carried in appeal to the Supreme Court. In that case, the Karnataka bank Ltd (hereinafter referred to as "the Bank"), by notice dated 27th January 1995, convened an EGM, scheduled for 2nd March 1995. The appellants before the High Court (who were two of the Directors of the Bank) moved the trial court on the ground, inter alia, that the convening of the said meeting had to be accompanied by an explanatory statement, as provided in Section 173 of the Companies Act, 1956 (corresponding to Section 100 of the present Act). As in the present case, the contention, of the said aggrieved Directors, was that “a very cryptic explanatory statement has been annexed to the notice which states that the other directors have no interest in the item of business and only states that a requisition has been received for the convening of the meeting.” The four resolutions, set out in the Special Notice, were for removal of four Directors, including the two directors who had appealed to the High Court. The learned Trial Judge held that the case was not one that deserved grant

of ad interim orders stopping the meeting from taking place. In revision therefrom, the High Court opined that the act of removal of a director, from office, was one with serious repercussions, and that, therefore, the notice calling for the meeting had necessarily to set out the specifics of the allegations against the said directors, so that the shareholders at the meeting would be able to impartially adjudicate thereon. Significantly, the High Court found particular fault with the fact that a letter, dated 7th January 1995, which actually set out being a chance against the directors and was the catalyst in prompting the decision to remove them from office, was not circulated with the notice proposing the meeting. This decision substantially echoes the submission of Mr Sapra in the present case. However, the Supreme Court, in appeal therefrom [P. Rajan Rao v B. G. Somayaji, (1995) 83 Comp Cas 662 (SC)], ruled as under:

“2. We are satisfied that there was no ground available to the High Court for setting aside the trial court's order refusing to grant the injunction for holding the extraordinary general body meeting (EGM) of the company. We are informed that the EGM is scheduled to be held on 30-3-1995. The injunction granted [B.G. Somayaji v. Karnataka Bank Ltd., (1995) 83 Comp Cas 649 (Kant)] by the High Court is, therefore, vacated. Moreover, the appellants also undertake to circulate a copy of the letter dated 7-1-1995, Annexure ‘B’ to the shareholders who attend the extraordinary general meeting before commencement of the extraordinary general meeting.

(Emphasis supplied)

168. After this, in our view, no manner of doubt can remain, that the reasons for removal of Plaintiff No 1, in the present case, were required to be communicated, or made known, to her, only before the proposal, for removing her from office as Director of the Company, was taken up at the EGM. Queens Kuries (supra) has

necessarily to yield place to L.I.C. (supra). This issue, therefore, as necessarily to be decided in favour of the appellants and against the respondents.”

15. A perusal of the Articles of Association clearly shows that the Plaintiff No.1 is a non-rotational Director and can remain so long as he does not voluntarily resign. However, this Article is subject to the provisions of the Companies Act which permits the removal of a Director by majority share holders in a lawfully requisitioned EGM. Article 17 of the Articles of Association cannot therefore be treated as having precedence over the provisions of the Companies Act.

16. No injunction from calling the EGM can therefore be granted. The resolutions sought to be passed in the EGM have already been circulated. The hearing, if any, that the Plaintiffs seek can only be granted at the EGM and not before. The EGM having not been held, the suit is not maintainable and is also premature.

17. The injunction in respect of the EGM does not deserve to be granted. No other relief is pressed or arises. Thus, the present suit is not maintainable and is therefore dismissed. All pending I.As. also stand disposed of.

**PRATHIBA M. SINGH
JUDGE**

September 24, 2018
Rahul