

S.C. Suit No. 2039 of 2021, whereby the Notice of Motion taken out by the appellants-plaintiffs to restrain the respondent-defendant No. 5 from taking over or assuming office of the President of the Bandra Gymkhana ("the Gymkhana") - the defendant No. 1 and allied temporary interim reliefs, came to be rejected.

2) For the sake of the convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.

3) Background facts leading to this Appeal can be stated in brief as under:-

(a) The defendant No. 1- Gymkhana has been constituted under a registered Indenture of Lease dated 3rd October, 1934 ("the Indenture") executed by the plaintiffs and the then Trustees of defendant No. 1. Plaintiff Nos. 2 and 3 are the Life 'A' Member and Donor member, respectively, of defendant No. 1 – Gymkhana, and also Managing Committee members of the plaintiff No. 1 – Society.

(b) The affairs of defendant No.1 - Gymkhana are governed by the aforesaid Indenture of Lease and the rules and regulations of the Gymkhana.

(c) The defendant Nos. 2 and 3 are the Trustees of defendant No. 1- Gymkhana. The claim of defendant No. 4 that he is also a Trustee of the defendant No. 1 is contentious. Defendant Nos. 5 to 15 are the members of the Managing Committee of defendant No. 1. Defendant No. 16 was the Returning Officer for the election of the President and Managing Committee, which were held on 26th September, 2021.

(d) Initially, the instant suit was instituted, seeking a declaration that the purported Resolution passed by the Managing Committee of defendant No. 1 on 23rd July, 2021 and the notice dated 1st September, 2021 nominating the defendant No. 5 as the nominee for the post of President of defendant No. 1 were illegal and invalid and thus deserved to be cancelled and to restrain the defendants from conducting election to the post of the President of Gymkhana for the year 2021-2023 at its Annual General Meeting which was scheduled to be held on 26th September, 2021.

(e) The suit came to be instituted with the principal contentions that the notice dated 1st September, 2021 for election of the President for a term of two years i.e. 2021-2023 was contrary to Rule 21 of the rules and regulations which

mandate election of the President annually; the defendant No. 5 was not eligible for being elected to the post of the President as she was an Ordinary Member and did not fulfill the qualification criteria for appointment to the post of the President and the defendant No. 1 despite being called upon to clarify the decision gave evasive reply about the eligibility of defendant No. 5 to contest the election for the post of the President.

(f) By an order dated 24th September, 2021, the leaned Judge, City Civil Court declined to grant ad-interim relief. Eventually elections were held. Defendant No. 5 came to be elected for the post of the President of defendant No. 1.

(g) In Appeal No. 395 of 2021, preferred by the appellants against the order dated 24th September, 2021 declining to grant ad-interim relief, by an order dated 13th December, 2021, this Court was persuaded to expediate the hearing and decision of Notice of Motion No.2330 of 2021 and also the application of the plaintiffs to amend the plaint, on their own merits.

(h) Chamber Summons No. 94 of 2022 taken out by the plaintiff, came to be allowed. By way of amendment, the plaintiffs also sought a declaration that the election of defendant No. 5 as President of defendant No. 1 on 26th September, 2021 was

contrary to the rules and regulations of defendant No. 1 and the Indenture thus null and void. By taking out instant Notice of Motion No. 1460 of 2022, the plaintiffs also prayed for temporary injunction to restrain the defendant No. 5 from in any manner taking over and assuming office of the President of defendant No. 1 and stay the effect and implementation of any action taken by the defendant No. 5 pursuant to the impugned election.

4) Defendant Nos. 1 to 9 and 13 to 15 resisted the Notice of Motion. The substance of the resistance put forth by the defendants was that the elections were held in conformity with governing rules and regulations and the plaintiff had acquiesced in the election of the President for a term of two years and, in fact, the defendant No. 5 herself was twice elected as the President of defendant No. 1 for a term of two years. It was contended that the defendant No. 5 took over the charge of the office of the President on 22nd July, 2022. Thus, the Notice of Motion did not deserve to be entertained.

5) The learned Judge, City Civil Court, after appraisal of the pleadings, documents tendered and the submissions canvassed, was persuaded to reject the Notice of Motion holding *inter alia* that the defendant No. 5 was an ordinary Life Member of

defendant No. 1 and thus eligible to hold the post of the President. The fact that the defendant No. 5 had been twice elected as the President of the defendant No. 1 for a term of two years, since the year of 2017 also weighed with the learned Judge. Resultantly, in the opinion of the learned Judge there was neither *prima facie* case nor balance of convenience in favour of the plaintiffs.

6) Being aggrieved the plaintiffs are in Appeal.

7) I have heard Mr. Ashish Kamat, the learned Senior Advocate for the appellants and Mr. S. U. Kamdar, the learned Senior Advocate for the respondent Nos. 1 to 9 and 13 to 15. With the assistance of the learned Counsel for the parties, I have also perused the material on record.

8) Mr. Kamat would urge that the impugned order is in clear ignorance of the provisions contained in Rule 21 of the Rules and Regulations. The learned Judge, according to Mr. Kamat, has simply misconstrued nature of the membership of the defendant No. 5, namely, an ordinary Life Member, a non existent category of members. It was strenuously urged that the plaintiffs never approached the Court with a case that the defendant No. 5 was an ordinary Life Member. In fact it has been the consistent and

positive case of the plaintiffs that the defendant No. 5 being the wife of defendant No. 13, a Life Member, was an Ordinary Member, being a spouse of a Life Member, and no more.

9) Secondly, Mr. Kamat would urge that the learned Judge committed an error in equating the tenure of the Managing Committee with that of the President of the defendant No. 1. under Rule 21 read with the Indenture where the settler had provided in unequivocal terms that the President would be elected “annually”. Rule 33 makes the provisions in Rule 21 inviolable as the defendant No. 1 has been proscribed from amending certain significant Rules, which includes Rule 21.

10) Mr. Kamat would urge that the fact that in the past the President had been elected for two years, or for that matter the defendant No. 5 herself was elected as the President twice, is of no significance as there can not be any premium on illegality. Therefore, even at this stage, according to Mr. Kamat, the plaintiffs deserve injunctive relief restraining the defendant No. 5 from continuing to hold the office of the President to which the defendant No. 5 is not lawfully entitled to.

11) In opposition to this, Mr. Kamdar stoutly submitted that the impugned order does not warrant any interference. It was

submitted that the plaintiffs having acquiesced in both the two year term and nomination of defendant No. 5 for the post of the President, not once but twice, it is not open for the plaintiffs to raise the grievances. In any event, having regard to the fact that the defendant No. 5 fulfills the essential eligibility criteria and the Rules empower the managing committee to nominate even an Ordinary Member for the post of the President and defendant No 5 having also been duly elected in the election held on 29th September, 2021, no case for grant of interim relief, at this stage, is made out.

12) I have given anxious consideration to the aforesaid rival submissions. Before advertng to consider the aforesaid submissions, it may be apposite to note few facts which are, by and large, uncontroverted. Establishment of defendant No. 1 under the Deed of Indenture dated 3rd October, 1934 is incontrovertible. There is not much controversy over the fact that the affairs of defendant No. 1 are governed by the Rules and Regulations (Annexure B to the plaint). Elections to the post of President and Managing Committee members of defendant No. 1 were due for the year 2021. Indisputably, the out going Managing Committee is empowered under the Rules to nominate six

persons for being elected to the Managing Committee and three persons of being elected to the post of the President.

13) By a notice dated 23rd July 2021, the Managing Committee resolved to nominate six persons for election to the members of the Managing Committee for the year 2021-2023. Vide notice dated 31st August, 2021, the Managing Committee nominated three persons, including defendant No. 5, for the post of President to be elected for two years 2021-2023. Elections were to be held on 26th September, 2021. As noted above, the defendant No. 5 came to be elected as the President of the defendant No. 1 in the election held on 26th September, 2021 and assumed the office on 22nd July, 2022.

14) In the wake of the aforesaid facts, the controversy between the parties essentially revolves around two aspects, one, the eligibility of defendant No. 5 to hold the post on the President. Two, the term of office of the President of defendant No. 1.

15) On the first count, it is imperative to note again there is not much controversy over the fact that the defendant No. 5, being the spouse of defendant No. 13, a Life Member, was granted Ordinary Membership of defendant No. 1. At the heart of the controversy is the eligibility of defendant No. 5 to hold the office

of the President of defendant No. 1. To determine this controversy, recourse to few provisions of Rules and Regulations becomes necessary. Under Rule 3, the classes of members of defendant No. 1 are (a) Founders; (b) Patrons; (c) Benefactors; (d) Donors; (e) Life Members- A, B, C & D classes; (f) Ordinary Members; (g) Associate Members; (h) Casual Members; (i) Honorary Members; and (j) Dependent Members.

16) Rule 5(a), with which we are primarily concerned, provides for membership to the spouse of Life Member 'A' Class, as under:-

“...(e) Any person eligible for membership as a Life Member and paying not less than Rs.75,000/- to the Club may be admitted as a Life Member 'A' Class. Such Life Member shall be exempt for life from the payment of the monthly club subscription only. The husband or wife of such Life Member shall, on intimation by such Life Member to the Honorary General Secretary of his or her desire to be a Member, be enrolled as an Ordinary Member and shall likewise be exempt from the payment of the monthly subscription only...”

17) Election of the President of the defendant No. 1 is governed by Rule 21, as under:-

“21. The first President of the Club shall be Dr. Sir Dominic A. D'Monte. He shall hold office for life or for so long as he may be willing so to act. Presidents shall otherwise be elected in the following manner annually.

At the meeting at which the Managing Committee nominates 6 members for election to the new Managing Committee it shall also nominate 3 members from among the Founders, Patrons, Benefactors, Donors, and Life Members, if available, for the office of the President. The Honorary General Secretary shall forward a list of these 3 names to all members of the Club other than Associate, Causal, Honorary or Dependent Members for election of one of these as President. A date shall be fixed on which this list shall be returned. At the next meeting of the Managing Committee these lists shall be scrutinised and the Managing Committee shall declare the name of the President so elected.

The President shall preside ex-officio at all meetings of the Managing Committee and at all General Meetings. In his absence the meeting shall elect its own Chairman.

Associate, Honorary, Dependent or Causal Members are not eligible for this office.”

18) Rule 33, on which a strong reliance was placed by Mr. Kamat to bolster up the submission that Rule 21 could not have been amended, reads as under:-

“33. Notwithstanding anything to the contrary hereinbefore contained, the following rules shall never be altered:-

Rules Nos.2, 3, 4, 9, 15 a, b & e, 18b, 21 and 29b and this rule.....”

19) Clause 6 of the second Schedule to the Indenture, reads as under:-

“...6. The first President of the Gymkhana shall be Dr. Sir Dominic D'Monte. He shall hold office for life or for so long as he may be willing so to act, Presidents shall otherwise be elected in the following manner annually.

The Managing Committee shall nominate 3 members from among the Founders, Patrons, Benefactors, Donors and Life Members if available and if not available from among the ordinary Members for the office of President. The Honorary General Secretary shall forward a list of these 3 names to all members for election of one of them as President. A date shall be fixed on which this list shall be returned. At the next meeting of the Managing Committee these lists shall be scrutinised and the Managing Committee shall declare the name of the President so elected.

The President shall preside ex officio at all meetings of the Managing Committee and at all General meetings. In his absence the meeting shall elect its own Chairman.

Associate or Causal Members shall not be eligible for this office... ”

20) Laying emphasis on the provisions contained in Clause 6 of the Indenture and Rule 21 (extracted above), Mr. Kamat strenuously submitted that an Ordinary Member does not become eligible to the post of the President unless there is no Patron, Benefactor, Donor and Life Member. Since there are Life Members, the nomination of defendant No. 5 by the Managing Committee, was wholly unsustainable. An Ordinary Member can only be nominated where no person from the preferred classes of members was available, submitted Mr. Kamat.

21) A correct construction of the aforesaid Clauses bears upon the core question in controversy, which is required to be

adjudicated at the trial. At this state, it has to be seen whether the plaintiffs succeed in making out a *prima facie* case to restrain the defendant No. 5 from holding the office of the President.

22) First and foremost, it is imperative to note that an Ordinary Member is not per se ineligible to hold the office of the President. Both Clause 6 of the Indenture and Rule 21 expressly state as to who is not eligible to hold the office of the President namely Associate Honorary, Dependent and Casual Members of the defendant No. 1. In contradistinction apart from Founders, Patrons, Benefactors Donors, Life Members, an Ordinary Member is eligible to hold the office of the President. The necessary corollary is that the defendant No. 5 possesses an essential qualification of membership to hold the post of President.

23) Secondly, both Clause 6 as well as Rule 21 use the expression, "if available". What is the import of the said expression "if available" ? An answer to this question can be legitimately and completely explored at the trial as evidence may bear upon the same. *Prima facie*, the expression, "if available" need not necessarily be construed as physical availability of the members of the preferred classes. "If available" *prima facie*,

seems to be an elastic term to include availability to assume the responsibility of the office of the President.

24) Thirdly, at this stage, the fact that, in the past, persons who were not the Life Members, were nominated and elected to the office of the President, including the defendant No. 5 herself (twice), can not be said to be insignificant. It would, in the least, indicate the manner in which the Clause 6 and Rule 21 have been understood and acted upon by the plaintiffs and defendant No. 1.

25) From this stand point, the fact that Mr. Cornel K. Gonsalves, the Secretary of plaintiff No. 1-Society was the member of the Managing Committee which, in its meeting dated 30th May, 2017, nominated the defendant No. 5 as the nominee for election to the post of President, for the said year, was rightly taken into account by the learned Judge, City Civil Court. The relevant part of the Resolution passed in the said meeting is of some salience on both the counts, namely, the eligibility of the defendant No. 5 and the term of office. It reads as under:-

“...Under Rule 21- Nomination of 3 members for the post of President-Darryl D'Monte proposed the name of Mrs. Cheryl Misquitta which was seconded by Roger Pereira. Cornel K. Gonsalves proposed Rufus Barretto and Ronald D'Silva which was

seconded by denita Gomes. Ajit Rodrigues stated that we would have a problem next year since there would be no election to the Managing Committee. Cornel K. Gonsalves informed him that under Rule 21, it clearly states that at the meeting of the Managing Committee nominating 6 members for election to the new Managing Committee, it should nominate 3 members basis the eligibility criteria for the President. Hence, it is obvious that whoever is the current President being nominated above would also be for a period of two years. Moreso, it is very clear that the President should preside ex-officio for all meetings and AGM and if necessary in his absence the meeting shall elect its own Chairman. The above was approved unanimously.... ”

26) The aforesaid Resolution would indicate that Mr. Cornel K. Gonsalves, the General Secretary of the plaintiff, had not opposed the nomination of defendant No. 5. It is not the case that Mr. Gonsalves was not an active participant in the said meeting. Evidently, Mr. Gonvsalves had proposed two names for being nominated for election to the post of the President. It would be contextually relevant to note that the Managing Committee further resolved that the President would henceforth hold the office for a period of two years.

27) In the aforesaid view of the matter, where there is material to indicate that the defendant No. 5 had been twice elected to the office of the President, without her eligibility having been questioned, and the defendant No. 5 is otherwise not in-eligible

to hold the office of President, in my view, at this length of time, the learned Judge correctly exercised the discretion not to interdict the election of defendant No. 5 as the President.

28) The second count of challenge, to the term of the office of the President, at the first blush, appears attractive. Both Clause 6 of the Indenture and Rule 21 provide for election of the President of defendant No. 1, annually. Evidently, elections were held for the office of President for a term of two years 2021-2023. Thus, the said exercise may appear to be contrary to the Rules. However, at this interim stage, the totality of the circumstances can not be lost sight of.

29) By a Resolution passed in the 80th Annual General Meeting of the defendant No. 1 held on 25th September, 2016, Rule 16 of the Rules and Regulations of the defendant No. 1 came to be amended and the term of the office of the Managing Committee was enhanced to “two years” from “one year”. Evidently, there is no, and there cannot be any, challenge to this amendment as Rule 33 does not limit the powers of the defendant No. 1 to amend Rule 16. It would be contextually relevant to note that under Rule 18, which governs the election of the Managing Committee provisions have been made to convene a meeting of

the members elected to the new Managing Committee under Rule 15 and at such meeting the President elected under Rule 21 shall take office and thereupon the members elected under Rule 15 A, B, C and E present at the said meeting as the members of the Managing Committee. Difference in the term of the office of the President and Managing Committee thus posed an incongruous situation. It is *prima facie*, in that context, in the meeting of the Managing Committee held on 30th May, 2017, a Resolution came to be passed that the President would hold office for a period of two years (extracted above). It seems that since then for the President a two year term of office has been provided so that the term of the office of the President becomes 'coterminous' with the term of the Managing Committee (two years).

30) I am, therefore, impelled to hold that the learned Judge, City Civil Court committed no error in declining to exercise the discretion in favour of the plaintiffs. Since the learned Judge has kept in view the principles which govern grant of temporary injunction and correctly applied those principles to the facts of the case at hand, no interference is warranted in exercise of limited appellate jurisdiction. Resultantly, the Appeal fails.

31) Hence, the following order.

:-ORDER:-

- i) The Appeal stands dismissed.
- ii) By way of abundant caution it is clarified that the observations are confined to determination of Appeal against the order declining to grant temporary injunction and the trial court shall not be influenced by any of the observations hereinabove while adjudicating the suit finally.
- iii) In view of the dismissal of the Appeal, the Interim Application also stands dismissed.

[N. J. JAMADAR, J.]