ORIENTAL METAL PRESSING WORKS (P.) LTD.

v.

BHASKAR KASHINATH THAKOOR & ANOTHER

1960

December 16.

(JAFER IMAM, A. K. SARKAR and RAGHUBAR DAYAL, JJ.)

Company—Managing director appointing his successor by will —Validity — 'Assignment', Meaning of — Companies Act, 1956 (1 of 1956), ss. 312, 255.

By s. 312 of the Companies Act, 1956, "Any assignment of his office made after the commencement of this Act by any director of a company shall be void."

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The managing director of a private company, empowered by the terms of the agreement between him and the company and the articles thereof to appoint, by deed or by will, any person to be the managing director in his place and stead, died leaving a will whereby he appointed one of the appellants the managing director in his place from the date of his death. The High Court took the view that the word 'assignment' in the section included 'appointment' and as such the appointment in question was void.

Held, that s. 312 of the Companies Act, 1956, cannot be interpreted in such a way as to bring it into conflict with s. 255 of the Act since its language does not compel such an interpretation. The word 'assignment' in that section does not mean appointment and the section is intended to render a transfer of his office by a director void and not an appointment by him of his successor.

Section 255 of the Act, which expressly permits directors to be appointed otherwise than by the company, shows that, subject to the limit as to numbers prescribed by it, a director, authorised by the articles of the company, can appoint another to take his office when rendered vacant by his resignation or death or on expiry of his term of office.

The proviso to s. 86B of the old Act cannot lend any support to the argument that the word 'assignment' in s. 312 of the new Act includes 'appointment'.

The Guardians of the Poor of the West Derby Union v. *The Metropolitan Life Assurance Society*, [1879] A. C. 647, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10 of 1960.

Appeal from the judgment and decree dated February 24, 1959, of the Bombay High Court in First Appeal No. 540 of 1958.

M. C. Setalvad, Attorney-General for India, A. P. Bhatt, Rameshwar Nath, S. N. Andley, P. L. Vohra and *J. B. Dadachanji*, for the appellants.

The respondent did not appear.

1960. December 16. The Judgment of the Court was delivered by

Sarkar J.

SARKAR, J.—Dadoba Tukaram Thakoor carried on a business under the name and style of Oriental Metal Pressing Works. On May 26, 1955, a private company was incorporated under the name of Oriental Metal Pressing Works Ltd., hereafter called the Company,

to take over the aforesaid business. On July 7, 1955, Dadoba transferred his business to the Company. On the same date, an agreement was made between him and the Company by which he was appointed the managing director of the Company for life and was given the power "by deed inter vivos or by will or codicil to appoint any person to be a managing director in his place and stead". Regulation 109 of the articles of the Company reproduced these provisions. The shareholders of the Company were Dadoba, his brother, the respondent Bhaskar, and his two sons, the appellant Govind and the respondent Harish, of whom the first three were the directors, Dadoba being the managing director. This constitution of the Company continued till Dadoba's death on January 14, 1957.

Dadoba had died leaving a will whereby he purported to appoint the appellant Govind the managing director of the Company in his place from the date of his death. Shortly after Dadoba's death, disputes arose between the appellant Govind and the respondent Bhaskar. The appellant Govind was contending that the respondent Bhaskar had ceased to be a director on account of his failure to attend the directors' meetings. He also purported to co-opt the appellant Bhalchandra as a director. The respondent Bhaskar contended that he had not ceased to be a director and challenged the legality of the appointment of the appellant Bhalchandra as a director. He further contended that the appointment of the appellant Govind as the managing director of the Company by the will of Dadoba, was void. On November 22, 1957, the respondent Bhaskar filed a suit in the City Civil Court of Bombay against the Company, the appellants Govind and Bhalchandra and the respondent Harish for the following declarations and for reliefs incidental thereto:

(a) the appointment of the appellant Govind as the managing director was void;

(b) the appointment of the appellant Bhalchandra as director was illegal and inoperative; and

(c) he (the respondent Bhaskar) was and continued to be a director.

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The learned Judge of the City Civil Court accepted all the contentions of the respondent Bhaskar and made the declarations claimed.

The Company and the appellants Govind and Bhalchandra appealed from this decision to the High Court at Bombay. The appeal came up for hearing before a bench of two learned Judges of that Court. These learned Judges having taken different views, the matter was referred to another learned Judge of the same High Court. In the eventual result according to the opinion of the majority of the learned Judges, the appeal was dismissed and the decree of the City Civil Court was confirmed. The High Court however granted a certificate under Art. 133(1)(c) of the Constitution and the present appeal has been filed by the Company, Govind and Balchandra pursuant thereto. The respondents to this appeal are Bhaskar and Harish.

It appears that while the appeal was pending in this Court, the respondent Bhaskar sold his holding in the Company to the appellant Govind and has now no interest in the Company or the appeal. No one has consequently appeared to contest the appeal in this Court, the respondent Harish apparently not being interested in doing so. In these circumstances, the questions whether the respondent Bhaskar continues to be a director and whether the appellant Bhalchandra was legally co-opted as a director are no longer live issues and have not been canvassed in this appeal. On those questions therefore we express no opinion. Another result, rather unfortunate, has been that we have not had the advantage of arguments against the appeal.

The Courts below held that the appointment of the appellant Govind as managing director by the will of Dadoba was void in view of the provisions of s. 312 of the Companies Act, 1956. That section reads thus:

> *S. 312.* "Any assignment of his office made after the commencement of this Act by any director of a company shall be void."

The Act came into force on April 1, 1956 and Dadoba had both made his will and died, after that date. The appointment of the appellant Govind as managing

director was, therefore, made after the commencement of the Act.

Now, s. 312 makes the assignment of his office by a director void. It does not on the face of it, say that an appointment by a director of another person as the director in his place, would be void. The High Court, however, took the view that the word "assignment" in the section included "appointment", and so, such an appointment would also be void under the section. What we have to decide is whether the High Court was right in this view.

Before we proceed to examine this question, we have to point out one thing. It appears that the High Court thought that the appellants had conceded that an appointment by a director of another in his place by act inter vivos would be an assignment of the office of a director within s. 312, and had only contended that such an appointment by will, which is what had been done by Dadoba, would not be an assignment and would not therefore be rendered void by the section. The learned Attorney-General, appearing for the appellants, said that in this the High Court was in error and no such concession had been made. He further expressly withdrew that concession. This he was clearly entitled to do. It, therefore, becomes unnecessary for us to deal with the reasonings of the High Court in support of the view accepted by it, which were based on the concession.

We have given the views of the High Court a most respectful and anxious consideration but we do not find ourselves able to agree with them. We will presently state our reasons for this conclusion, but now we wish to point out that in the view that we have taken of the matter it will not be necessary for us to deal with the argument advanced in the High Court that the section only forbade a director from appointing his successor, assuming assignment included appointment, but it did not prevent a managing director from assigning his office, or appointing his successor which was what Dadoba had done. If the section did not prevent a director from appointing his successor, which we do not think it did, then, clearly, there is nothing

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in it which can justify the view that a managing director cannot appoint his successor.

The section says that a director shall not be able to assign his office. It may be, as the High Court pointed out, that apart from "transfer" another meaning of the word "assignment" is, "appointment". But on a plain reading of the language used in the section, it does not seem to us possible to hold that the word "assignment" in it, can mean "appointment".

First, the section talks of "assignment of his office" by a director. The word "his" would indicate that the office contemplated was one held by the director at the time of assignment. An appointment to an office can be made only if the office is vacant. It is legitimate, therefore, to infer that by using the word "his" the Legislature indicated that an appointment by a director to the office which he previously held but did not hold at the date of the appointment, was not to be included within the word "assignment". Again, there can be no doubt that the section was intended to render void a transfer of his office by a director for, if the section had intended only to avoid an appointment by a director of his successor, it would have clearly said so and would not have used the word "assignment". Therefore, even if it is possible for the word "assignment" to have the meaning of "appointment", then it would have to be given both the meanings of "transfer" and "appointment" in the section. This is what the High Court did. That would produce a curious result. Transfer and appointment are clearly entirely different things. Even apart from considerations arising from the law of conveyance, which the High Court was unable to entertain in connection with the transfer of an office, a transfer from its very nature inevitably imports the passing of a thing from one to another; a transfer without the passing of the thing transferred, even when that thing is an office, cannot be conceived. An "appointment", on the other hand, has nothing to do with anything passing from one to another; it connotes the putting in of someone in a vacancy. The acts constituting a transfer and an appointment are

therefore wholly dissimilar. It would be an unusual statute which by the use of a single word intended to prohibit at the same time, two wholly different acts. We do not think that a construction leading to such a result is permissible.

Secondly, s. 255 of the Act permits one-third of the total number of directors of a public company and all the directors of a private company to be appointed otherwise than by the company at a general meeting, if the articles make provision in this regard. The Act therefore expressly permits directors to be appointed otherwise than by the company. It follows that within the limit as to the number prescribed by the section, a power of appointment of directors can be legitimately conferred by the articles on any person including one who holds the office of a director. The Act expressly permits such power being conferred. In order, however, that a director may exercise this power of appointment, there must be a vacant office of a director. He may himself bring about that vacancy by resignation of his office. The vacancy would again be caused by his death or by the expiry of the term of his office. It would follow that the Act contemplates an appointment by a director of another person as director to take his office, when made vacant by his resignation or death or the expiry of the term of his office. There will be nothing illegal, if the power is exercised in the case of the death of the director, by an appointment made by his will. It will not be right so to interpret s. 312, when its language does not compel it, as to bring in conflict with the provisions of s. 255. This would happen, if the word "assignment" in s. 312 was interpreted as including "appointment" and thereby making it prevent a director from appointing his successor when s.. 255 permits him to do that. Therefore again we think that in s. 312 the word "assignment" does not mean "appointment".

The High Court was of the view that unless "assignment" included "appointment", the object of the Act would be defeated. It was said that the intention and the object of the section was to restrain and

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prevent a director from putting some one in his place and stead by any act on his part. This point was further expressed more clearly in the following words: "It is now well understood that the new Companies Act, aims at eradicating many serious mischiefs which the principle of perpetual management of companies had caused in the past". The High Court felt that it would be defeating that aim by reading s. 312 as if the words "assignment of his office" only meant a "transfer of office" and did not include the appointment of his successor by a director. Apparently the High Court thought that by making it possible for a director to choose his successor, the management of the company would be permitted to remain all along in one hand and this the Act wanted to prevent. It does not seem to us that the Act wanted to prevent this. The act by enacting s. 255 shows that it does not disapprove of a person having power to appoint a succession of directors and in the case of a private company, a succession even of all the directors. Such a person would have what has been described as "perpetual management". It would follow that the Act did not consider this as an evil which required prevention. If perpetual management by an outsider is not an evil, nor would such management by one who is a director of the company be so. This aspect is very clearly illustrated by the case in hand. Dadoba had this "perpetual management". But the whole of the Company's undertaking was really a largess from him. In fact he held nearly 43% of the shares of the Company. It is inconceivable that perpetual management by him would have worked to the detriment of the Company. We are therefore unable to agree that it was the object of the Act or of s. 312 to prevent a director from appointing his successor.

In view of the clear provisions of s. 255 we do not think that it can be said, as was done in the High Court, that ss. 254 and 317 of the Act, impliedly indicate that there should be no perpetual management. Section 254 says that a corporation or an association of persons shall not be eligible as a director. But this is not because, otherwise, there would be perpetual

management. The persons comprising the corporation or the association must change from time to time and so, even if they were appointed directors, there would be no perpetual management. We rather think that the idea behind s. 254 is that as the office of a director is to some extent an office of trust, there should be somebody readily available who can be held responsible for the failure to carry out the trust and it might be difficult to fix that responsibility if the director was a corporation or an association of persons. Turning to s. 317, we find that it provides that a managing director cannot be appointed for a term exceeding five years at a time. Section 315 however makes s. 317 inapplicable to a private company. Therefore, s. 317 is not available to support an argument that the Act does not want a private company—and we are concerned with that type of a company—to be under perpetual management. But indeed s. 317 does not support that argument in the case of a public company either. It forbids an appointment of a managing director for more than five years "at a time". It permits the managing director to be reappointed after a term is over. If he is so re-appointed, then there would be "perpetual management" by him. The Act does not, therefore, intend by s. 317, to prevent that. Lastly, s. 317 is not concerned with the directors, which s. 312 is.

Another argument that has to be dealt with is that if s. 312 does not prohibit an appointment by a director of his successor, that section can easily be rendered infructuous by a director adopting the simple device of appointing a person as his successor in office instead of transferring the office to him. It seems to us that the question does not really arise. A director can legally and effectively appoint his successor only to the extent the articles permit this subject, of course, to the limit prescribed in s. 255 in the case of a public company. An appointment so legally made does not result in an evasion of s. 312 for, as we have earlier said, the section could not have intended to prevent what another section in the same

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Act made legal. An appointment made outside the powers legally conferred by the articles is wholly ineffective, and therefore is not an appointment at all and hence again, does not result in an evasion of s. 312.

We have now to consider an argument based on the first proviso to s. 86B of the Companies Act of 1913. The main part of s. 86B contained a provision analogous to that of s. 312 of the new Act. It made an assignment of his office by a director to another person, under an agreement with the company, void, unless such assignment was approved by a special resolution of the company. Under the new Act the assignment has been made altogether void and would not become valid even if approved by a special resolution of the company. Now, the proviso laid down that the exercise by a director of a power to appoint an alternate director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, would not be deemed to be an assignment of office within the meaning of this section. The High Court took the view that this proviso showed that in certain circumstances an appointment by a director of another in his place might be deemed to be an assignment of his office and that since the new Act is a consolidating Act, it must be deemed to have continued the policy of the earlier Act and, therefore, for the purpose of s. 312, an "assignment" must include an "appointment".

The learned Attorney-General pointed out that in the new Act there is no proviso, and therefore the rule of construction applied by the High Court, which enables by raising a presumption, something to be included in the main part of a section by reason of a provision in a proviso to it, has no application to the new Act for, here the provision in the proviso has been enacted in the form of an independent section, namely, s. 313. According to him, this departure from the old arrangement of the provisions, in the new Act shows that it was not intended to continue the policy

of the old Act. He also said that the proviso in substance stated that the appointment by a director of an alternate director might in certain circumstances be deemed to be an assignment. He pointed out that by using the word "deemed" the proviso made it clear that the appointment of an alternate director was not a real assignment of office but was only to be fictionally taken as one. His contention was that such fiction could arise in a case coming strictly within the proviso but could not by extension be made to arise in any other case. These seem to us to be arguments of weight. Further in s. 313 of the new Act, which has taken the place of the first proviso to s. 86B of the old Act, the power to appoint an alternate director has been given to the board and not to the director who intends to absent himself. No scope for any deeming provision as in the Act of 1913 remains. Therefore again an argument based on the proviso to s. 86B would not be available for the purpose of the present Act.

It further seems to us that the proviso to s. 86B does not indicate that it was intended that the word "assignment" in the main part of the section would include "appointment". The rule of construction on which the High Court relied in arriving at the view that it did, was put in these words: "It is a well established principle of construction that when one finds a proviso to a section, the presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso." This rule would enable the court to hold in regard to s. 86B at the most that an appointment of an alternate director by a director intending to absent himself would have been an assignment of his office but for the proviso. It would be an unwarranted extension of this principle to hold that all appointments of their successors by directors would be assignments within the main part of the section. In any case, in our view, as in s. 312 of the new Act, so under the main part of s. 86B of the old Act, an appointment of a successor to his office by a director, was not an assignment of his office by him for, the old Act contained in s. 83B,

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provisions substantially similar to those contained in s. 255 of the new Act, and the reasons which have inclined us to the view that in s. 312 the word "assignment" does not include "appointment" would equally lead to the same conclusion in regard to s. 86B. If the enacting part did not prohibit the appointment of his successor by a director, such prohibition cannot be read into it, in reliance upon a proviso. We may read here the observations of Lord Watson in *The Guardians of the Poor of the West Derby Union* v. *The Metropolitan Life Assurance Society* (1)

> "I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso."

It may be that the proviso was enacted *ex abundanti cautela* or it may be again, to prevent a possible argument that by the appointment of alternate directors an evasion of the main part of s. 86B was being attempted. In view of the fact that the power to appoint alternate directors was not given by the old Act, but had to be given by the articles, such an argument might not have been unlikely. Therefore, it seems to us that the proviso to s. 86B of the old Act does not assist the argument that in s. 312 of the new Act, the word "assignment" would include "appointment".

We think we ought to say something about what strikes us to be the policy behind s. 312 of the new Act. We have earlier said that under s. 255 of that Act a certain number of directors in a public company has to be appointed by the company in a general meeting. In the case of a private company likewise, the directors have to be appointed similarly except to the extent the articles otherwise provide. It would therefore appear to be the policy of the Act that to a certain extent the appointments of the directors have to be made by the shareholders. It is intended that a certain number of directors would be the chosen representatives of the shareholders. If a director appointed

(1) [1897] A.C. 647, 652.

by the company was permitted to assign his office, then the new incumbent would not be the chosen representative of the shareholders, and the intention of the Act would be defeated. It seems to us that it is to prevent this result that the Act forbids a director by s. 312 from assigning his office. Where however a director has been appointed otherwise than by the company in a general meeting, the shareholders have nothing to do with his appointment. Such a director is not the chosen representative of the shareholders and the shareholders cannot claim to have a say in the appointment of his successor. We can discern no policy in the Act which can be said to be liable to be defeated by the appointment of the successor of such a director by him. Therefore s. 312 was not concerned with such an appointment.

In the present case Dadoba had power under the articles to appoint a person to be the managing director in succession to him, and in exercise of that power he had appointed the appellant Govind as the managing director to hold the office after his death. Such power was clearly recognised by, and legal under, s. 255 of the new Act. For the reasons earlier stated, the exercise of such power does not offend s. 312. It follows that the appellant Govind had been lawfully and validly appointed the managing director of the Company.

We, therefore, declare that the appellant Govind had been validly appointed the managing director of the Company, and set aside the decisions of the Courts below that he had not been so appointed. We have not been asked to interfere with the rest of the judgment under appeal and we do not do so. We also make no order for costs as no costs have been asked.

Appeal allowed.