

# **BOMBAY HIGH COURT**

Western India Theatres Ltd

Vs.

Ishwarbhai Somabhai Patel

O.C.J. Appeal No. 29 of 1958 and I.C. No. 370 of 1955

(Chagla, C.J. and S.T. Desai, J.)

02.05.1958

## **JUDGMENT**

### **Chagla, C.J.**

1. This litigation has had a checkered history and has gone through many vicissitudes and we were hoping that its history would come to an end and it would have no more vicissitudes. Unfortunately, the litigation is destined for still more checkered history and to go through some more vicissitudes.

2. This is an appeal from an order passed by Mr. Justice Shelat under Rule 751 of the High Court Rules, directing that the petition should be advertised. The petition for winding up the appellant company was filed on the 9th November 1955 and my brother S.T. Desai ordered on the 3rd July 1956 that it should be advertised. There was an appeal against his decision and on the 20th July 1956 the appellate Court set aside that order and remanded the matter to the learned Judge. On the 16th August 1956 the matter came before the learned Judge when the petitioners applied to withdraw from the petition. Applications were made before him for substitution and those applications were dismissed and ultimately the petition was dismissed. There was an appeal against that decision and on the 1st March 1957 the appellate Court set aside the order of dismissal, substituted one Mulraj Dwarkadas in place of the original petitioners and remanded the matter to the Company Judge. The matter came before the learned Company Judge on the 12th March 1957. On that day Mulraj withdrew from the petition and the learned Judge made the order substituting in his place the present respondent Ishwarbhai Somabhai Patel.

3. The first contention that has been raised before us by Mr. Desai on behalf of the respondent is that this is not an appealable order. We had occasion to consider this matter at some length in *Bachharaj Factories Ltd. v. Hirjee Mills Ltd!*, In that case Mr. Justice Coyajee, on a petition to wind up a company, refused to make the order and adjourned it to a future date. An appeal was

preferred against this decision and the question that arose was whether the appeal lay under Section 202 of the Companies Act and in the judgment we pointed out that Section 202 conferred an important and valuable safeguard in respect of orders made in the winding up of a company and the scheme of the Companies Act

157 Bom LR 378 : AIR 1955 Bom 355

was that whereas with regard to other matters specific appeals were provided under Section 202, every order and decision in winding up was made subject to appeal. We made it clear that from that it did not follow that a purely procedural order made by a Judge in a winding up would be subject to appeal, but we took the view that the order passed by Mr. Justice Coyajee adjourning the petition was not an order intended to regulate the procedure either for the convenience of the Court or for the convenience of the parties. The petitioner was entitled to an order for winding up and Mr. Justice Coyajee in refusing to make the order and adjourning the petition was depriving the petitioner of a right to which he was entitled if his petition was well founded and therefore the grievance that he had was that the learned judge had refused to make the order of winding up and had adjourned the petition. Now, if we apply that test to the facts of the present case, it would be found that if the view we took in that case was correct then it must inevitably follow that the present order passed by Mr. Justice Shelat is also appealable.

4. It is said that all that Mr. Justice Shelat has done is to direct advertisements. He has made no order by which any party can be aggrieved. All that he has decided is that there is a prima facie case made out by the petitioner and the learned Judge without deciding anything directs advertisements to be given so that at a future date creditors and shareholders can appear before him, the matter can be fully argued and the learned Judge could ultimately decide whether the order of winding up should be passed or not. In our opinion, that, is really over-simplifying the situation. There can be no doubt that an order advertising a petition may have very serious consequences for the company which is sought to be wound up. The advertisements may seriously impair its credit and affect its reputation. Therefore there can be no doubt that the order is one which affects the company and it is an order with regard to which company can be legitimately aggrieved. But it is said that even so there must be a decision and it is urged that in merely giving directions for advertisement, all that has been done is to set in motion a certain procedure established by the Court. Now, it must be borne in mind that it was competent to Mr. Justice Shelat at this stage to have dismissed the petition and not to have acted under Rule 751. In the *Hirjee Mills* case, 57 Bom L.R. 378 : AIR 1955 Bombay 355 the petitioner was entitled to have an order of winding up. In this case the company was entitled to have an order of dismissal. In that case the petitioner was aggrieved because he did not get the order of winding up. In this case the company is aggrieved because the learned Judge did not dismiss the petition but proceeded to give directions under Rule 751.

5. Mr. Gupte contends that there is a distinction between an order of dismissal and an order directing advertisements under Rule 751. He concedes, as indeed he must, that if the petition had been dismissed, that order undoubtedly would have been subject to appeal. But there, according

to him, the learned Judge would have decided something. But as the matter stands today, the learned Judge has not decided anything. Mr. Gupte would have been right if all that the learned Judge could do at this stage was to order advertisements. If he could neither dismiss the petition nor pass any other effective order, then undoubtedly it could be said that the learned Judge has not decided anything. But surely in this case the learned Judge has decided something and his decision is that the petition should not be dismissed, that the petition discloses a prima facie case and that the case should be tried. Let us take an extreme case. If the petition was on the face of it not maintainable, if it was a creditor's petition and the petitioner was clearly not a creditor and yet the learned Judge had given directions under Rule 751 and not dismissed the petition, is it suggested that the company could not come in appeal and draw the attention of the Court of appeal to the fact that the petition was not clearly maintainable and should be dismissed. The position today is not so extreme as the illustration we have just given, but even so the case of the appellant is that on the face of the petition no case for winding up has been made out and the learned Judge should have dismissed the petition and not passed an order which is fraught with serious consequences to the company. In our opinion, looking to the wide language used in Section 202 and looking to the interpretation we have placed upon that section in 57 Bom LR 378 : AIR 1955 Bombay 355, the order made by the learned Judge is appealable.

6. Now, we wish to make this position clear. It is one thing to say that an order is appealable; it is another thing to say that the Court of appeal would ordinarily interfere with the discretionary order passed by the learned Judge under Rule 751. It would seem to us that except in a very gross case where the petition was not clearly maintainable, the Court of appeal would be loath to interfere with the discretion exercised by the learned Judge, because all that the learned Judge says at this stage is that he has considered the matter and it appears to him that there is a prima facie case and it requires further inquiry and investigation. In that sense it may be said that the learned Judge has not made up his mind. He has taken a prima facie view of the petition and the materials before him and he has felt that the materials before him would not justify him summarily dismissing the petition but that more materials, more inquiry and more investigation was necessary before he ultimately made up his mind whether the petition should be allowed or should be dismissed. Therefore, as we were just saying, it would require a very strong case indeed to induce the Court of appeal to interfere with the discretion exercised by the Company Judge in ordering advertisements under Rule 751.

7. There is one other procedural matter with which we might deal and that is the order of substitution which the learned Judge passed on 12-3-1957 substituting the present respondent in place of Mulraj. Mr. Purshottam wanted to challenge this order and to satisfy us that the order was bad. Now, if the order of substitution was not a proper order, the petition was liable to be dismissed, the company was clearly aggrieved by the order and it was open to the company to appeal against that order. The company did not choose to appeal against that order and today any appeal against that order is barred by limitation. Therefore, in our opinion, that order has become conclusive and it is not open to the appellant to challenge that order. It was suggested by Mr.

Purshottam that we should apply the analogy of the provisions in the Civil Procedure Code with regard to an appeal which permit all interlocutory orders to be challenged when an appeal is preferred against a final order. In our opinion, there is no analogy between an appeal against a final decree and the appeal preferred by the appellant against an order under Rule 751. The order of Mr. Justice Shelat is not final in the sense in which a Court passes a decree. The order of substitution is an independent order which could have been challenged at the time when it was made, just as an order under Rule 751 is an independent order which the appellant has challenged by this appeal. Having accepted the order of substitution by not preferring an appeal against it, in our opinion no is not open to the appellant in this appeal to challenge that order. We must, therefore, proceed on the basis that the substitution of the respondent was properly directed by the learned Judge below.

8. There is one other minor matter also to which reference might be made. When Mr. Justice Shelat ordered the respondent to be substituted on 12-3-1957, he gave permission to the respondent to amend the petition by making consequential amendments and Mr. Purshottam had drawn our attention to three or four pages of amendments which have been made pursuant to that order. It seems to us clear that those amendments are by no stretch of imagination consequential amendments and it is difficult to understand how it was possible to take the view that those amendments were made in conformity with the order passed by Mr. Justice Shelat. But here again, the appellant never objected to the amendments being made in the form in which they were made by the respondent. The practice on the Original Side is well known that where an amendment is ordered, the party amending amends the original proceedings and also amends the copies with the solicitors of the other side and we take it that when the amendments were made the copies with the solicitors of the other side were also amended. Now, that was the time when the appellant should have gone to the learned Judge and asked him to strike out these amendments as going beyond the order made by him. Nothing was done and it is left to Mr. Purshottam to make a grievance of it now in this appeal.

9. The third procedural matter which unfortunately we must decide in favor of the appellant and which necessitates the further delay in the disposal of this appeal, is the question as to whether the petition has been properly presented by the petitioner. The petition is signed by the constituted attorney of the petitioner, one Mr. Tijoriwala and the petitioner has executed a power of attorney in favour of Tijoriwala and the question is whether that power of attorney is a general or a special power of attorney, because under the rules framed by our High Court it is only an agent who is the donee of a power of attorney that can perform, any acts or take any proceedings in Courts on behalf of his principal. The power of attorney clearly recites that it is executed - although it is termed a general power of attorney which is immaterial - in order to authorise Tijoriwala to exercise all such powers and to take all such steps in relation to the said shares as Ishwarbhai Patel, the executant of the power of attorney, as the registered holder thereof could do; and earlier in the power of attorney it is pointed out that the five shares held by Patel have been sold for valuable consideration to Tijoriwala. Then follow the various powers conferred

upon Tijoriwala, but it is clear that all these powers are conferred in respect of these five shares. In other words, this power of attorney is restricted to the exercise of various powers by Tijoriwala in respect of one particular matter, the matter of the five shares sold by Patel to Tijoriwala; or, to put it in a different language, the power of attorney confers upon Tijoriwala powers with regard to one specific item of the property of Patel which property he has sold to the donee of the power of attorney. Now, apart from authorities, we should have thought that a power of attorney like this cannot be looked upon as a general power of attorney. We should have thought that a general power of attorney must confer upon the donee of the power all necessary powers with regard to the business of the donor or at least with regard to a particular class of business of the donor and even if one were prepared to take a liberal view of a general power of attorney, even so it must at least authorise the agent to act for the donor with regard to all his litigation in different Courts. But here we are faced with a power of attorney which deals with one specific matter which is recited, viz., the five shares sold by Patel to Tijoriwala, which confers no power upon the donee with regard to any other business or property of the donor, which confers no power upon the donee with regard to general litigation or all the litigation of the donor and which even with regard to litigation restricts his power to litigation with regard to these live shares. If any distinction is to be drawn at all between a general power of attorney and a special power of attorney, then it is difficult to understand that if this is a general power of attorney, what would be a special power of attorney.

10. In this connection we should draw attention to what the position was under the Civil Procedure Code and what the position is in view of the amendment made by the High Court to the relevant provisions in the Code. Under the Code, by Order 3, Rule 2, recognized agents were defined and they were defined for the purpose of R. 1 because R. 1 provides :

"Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent or by a pleader appearing, applying or acting, as the case may be, on his behalf."

Therefore, this rule puts a recognized agent on the same footing as the party himself or his pleader; and "recognized agents" were defined in clause (a) as persons holding powers of attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties. We are not concerned with the definition in clause (b). It is interesting to note that under the old Code, the corresponding provision was Section 37 and the relevant provision corresponding to Order 3 Rule 2(a) was, "persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearances, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties." Therefore, the old Code required a general power of attorney. The now Code only required a power of attorney which authorized the

agent to make and do such appearances, applications and acts on behalf of the party. Therefore, so long as the power of attorney had the necessary authorization, no further question as to the nature of the power of attorney had to be considered and the person holding the power of attorney would be able to act as a recognized agent within the meaning of Order 3 Rule 2. Now, our High Court has amended this rule and the amended rule, to the extent that it is relevant, is this : "Persons holding on behalf of such parties a general power of attorney authorizing them to make and do such appearances, applications and acts on behalf of such parties." Therefore, now the rule as amended requires a general power of attorney; not any power of attorney.

11. Now, the construction placed by the learned Judge on this rule is that when the amended rule talks about a power of attorney, such a power of attorney must be for the purpose of authorizing the agent to make or do appearances, applications or acts and no more and also that the words "authorizing them or him to make or do such appearances, applications and acts on behalf of such parties" are taken from Rule 2 as it appears in the Code and govern both kinds of powers of attorney. With very great respect, the learned Judge has erred in taking the view that because the rule says that the general power of attorney must authorize the party to make and do such appearances, applications and acts on behalf of such parties, all that is necessary to be included in the power of attorney is an authorization in favor of the donee of the power of attorney to make such appearances, applications and acts. If that were the correct view, then it is impossible to understand why the High Court amended Rule 2 at all, because Rule 2 as it stood already provided that the power of attorney must authorize the agent to do these acts. Therefore, the proper interpretation to place upon the amended rule is that although undoubtedly the power of attorney must authorize the agent to do the necessary acts, this authority must appear not in a special power of attorney but a general power of attorney. Therefore, far from the words which the learned Judge suggests being governing words, they do not even throw any light on what a general power of attorney should be. The interpretation of the expression "general power of attorney" must be made on general principles of law and not in the light of any provision contained in Order 3 Rule 2 itself, because all that Order 3 Rule 2 requires is that whatever be the power of attorney, that power of attorney must confer the necessary power upon the agent. But when the High Court by its amendment amended Rule 2, which did not qualify the power of attorney and did not describe the power of attorney and proceeded to describe the power of attorney as a general power of attorney, we have got to construe that expression and to decide what is a general power of attorney and that construction cannot be made dependent upon the fact that the power of attorney confers the necessary power upon the agent to make the necessary applications and to do the necessary acts. If that were the correct view, every power of attorney would come within the category of a general power of attorney, because it is impossible to visualize a power of attorney, executed by a person in order to authorise someone to file a suit or to make an application in Court, which will not contain that specific power in the power of attorney. Fortunately, this is not a matter of first impression. If one can speak from one's experience and knowledge of the practice on the Original Side of this Court, we cannot possibly imagine any such power of attorney which is before us ever passing muster of the Prothonotary's

office and being accented as a, general power of attorney. But it is not necessary to resort to one's experience and the practice because we have decisions of this Court which have made it clear as to what a general power of attorney, in contradistinction to a special power of attorney, is.

12. The first is a judgment reported in *Vardaji Kasturji v. Chandrappa Piraji*<sup>2</sup>, In that case the plaintiff, on the strength of a power of attorney from one Vardaji, filed a suit to recover a sum of money due on a mortgage debt and the power of attorney constituted Shrinivas the attorney of Vardaji with all powers relating to the recovery of the mortgage debt and the question that arose for the consideration of the Bench was whether this was a general power of attorney and at p. 45 (of ILR Bom) Mr. Justice Batchelor, Ag. C.J., says this :

"It seems to me perfectly immaterial that it authorises the doing, not of one act, but of several acts for the distinction is not between one act and several acts, but between an agency for a particular piece of business and an agency for all business or all business of a certain class. Here the agent is authorized to attend only to a particular business arising on a special occasion and is not authorized to transact all his principal's business or even all his business of a legal character."

Now, these remarks apply almost verba ipsissima to the facts of this case. Here the agency is for a particular piece of business. We sincerely hope that the only business that the petitioner has is not in respect of these five shares. Therefore, it cannot be said that the

<sup>2</sup> ILR 41 Bom 40

agency is in respect of all the business of the petitioner or all the business of a certain class; and, again to use the language of this judgment, the agent in our case is authorized to attend only to a particular business arising on a special occasion and is not authorized to transact all his principal's business or even all his business of a legal character. Here he is authorized to attend to the business of the five shares. He is not authorized to transact all the business of the petitioner or even to attend to all his litigation or matters arising out of it. We might point out that in this judgment Mr. Justice Bachelor refers to a decision in *Venkatarama Iyer v. Narasinga Rao*<sup>3</sup>, on which Mr. Desai has very strongly relied and he says that he is unable to concur with that decision. We think no useful purpose will be served by our considering that judgment when a Bench of this Court has as far back as 1916, considered it and found it difficult to agree with the decision.

13. There is a later, judgment reported in *Ephrayim v. Turner Morrison and Co.*, 32 Bom LR 1178. That is a judgment of Mr. Justice Baker and the, power of attorney authorized a person to realise the amount of a Basra decree by filing suits and doing all things necessary in the case. The person holding the power of attorney filed a suit on the foreign decree in the Bombay High Court and signed the plaint on the plaintiffs behalf and the question arose whether the plaint was properly signed and Mr. Justice Baker held it was not and the view taken by the learned Judge was that the power of attorney which authorized the attorney to act only in connection with one

particular matter, the realization of the amount which had been obtained against the defendants, was a special power of attorney. Mr. Desai says that the power of attorney which we are considering gives all and full powers to the donee with regard to the five shares and no powers are reserved by the executants of the power of attorney and therefore Mr. Desai says that quae the five shares the power of attorney is a general power of attorney. In our opinion, that is an erroneous approach to the matter. However full the powers may be which are conferred upon the donee, if they relate to one particular matter, if they are not general in the sense as referring to his whole business or a particular section of his business or to all his litigation, then the mere fact that wide and full powers are conferred upon the donee with regard to one specific matter will not make the power of attorney a general power of attorney. The connotation of the word "general" is that the power must be general with regard to the subject-matter, not general with regard to the powers conferred in respect of a subject-matter. What one has got to look at before one decides whether a power is general or special is what is the subject-matter in respect of which this power is conferred and if the Court comes to the conclusion that the subject-matter is not general, that it is restricted to something specific, something particular, then the power of attorney would not be a general power of attorney.

14. Mr. Desai has drawn our attention to a statement of the law in Halsbury, Volume I, page 150, where Halsbury is dealing with Classes of Agents and the learned author defines special and general agents and our attention is drawn to the definition of a general agent :

"A general, agent is one who has authority, arising out of and in the ordinary course of his business or profession, to do some act or acts on behalf of his principal in relation thereto; or one who is authorised to act on behalf of the principal generally in transactions of a particular kind or incidental to at particular

<sup>3</sup> ILR 38 Mad. 134

business."

Now, this is a definition of a general agent irrespective of any power of attorney. Halsbury is not dealing here with powers of attorney. We are not concerned with the nature of the agency or the type of the agent which files a petition or makes an application on behalf of his principal. Whatever the nature of the agent may be, what the law requires is that he should be constituted no agent by a general power of attorney.

15. In our opinion, therefore with respect to the learned Judge, he was in error when he took the view that the power of attorney under which the petition has been signed by Tijoriwala was a general power of attorney. If this was not a general power of attorney, then clearly the petition has not been properly signed.

16. Now, the question is, what is the legal consequence of a petition not being properly signed by the petitioner. In our opinion, this is a mere irregularity which can be cured at any time. That is

the view also taken by Mr. Justice Baker in the case to which reference has been made by us and also in *Lingangouda Marigouda v. Lingangouda Fakirgouda*<sup>4</sup>, We are told that the petitioner himself is present in Court and he is prepared to sign the petition if we direct him to do so. If the petitioner signs, the petition, then the flaw which rendered the petition bad or made it not maintainable disappears. The only objection to the petition is that it is signed by an agent who is not a recognised agent. But if the petitioner himself signs it, then no further question arises with regard to the maintainability of the petition. We will therefore direct that the petitioner should sign the petition in Court.

17. Now that the petitioner has signed the petition, the appeal can proceed on merits. We adjourn it to the opening day of the next term.

Appeal adjourned.

<sup>4</sup>54 Bom LR 829