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BOMBAY HC: CONTENTS OF SPECIAL NOTICE REQUISITIONING EXTRA-ORDINARY GENERAL MEETING FOR REMOVAL OF DIRECTOR, DEFAMATORY?

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INTRODUCTION:

The High Court of Bombay (Bombay High Court) in its recent decision in *Rata Tata and Ors. v State of Maharashtra and Anr.* (Criminal Writ Petition No. 1238 of 2019 decided on 22 July 2019) held that the contents of the special notice issued by a shareholder, whilst requisitioning an extra-ordinary general meeting for removal of a director, was not *per se* defamatory, as the shareholder was exercising its statutory rights.

FACTS:

Pursuant to the meeting held on 24 October 2016 by the board of directors of Tata Sons Limited (TSL), Mr. Cyrus Mistry was removed as chairman as well as a board member of TSL. Subsequently, TSL being the principal shareholder of various Tata group companies proposed to remove Mr. Mistry from the board of certain Tata group companies.

During this time, independent directors of Tata Chemicals Limited (TCL) of which Mr. Nusli Wadia (Respondent no. 2) was a director, held a meeting on 10 November 2016 to review the recent events and the media reports which could impact the management of the business of TCL. Subsequent to this meeting of the independent directors, the independent directors of TCL issued a statement to the stock exchanges, affirming their confidence in the board of directors, chairman and management of TCL. Similarly, independent directors of Tata Motors Limited and Tata Steel Limited also held meetings.

Thereafter, TSL being a principal shareholder of TCL, through its chief operating officer and company secretary, gave a notice to TCL requisitioning the board of directors of TCL to convene an extra-ordinary general meeting (EGM) under provisions of Section 100 of the Companies Act, 2013 (Companies Act) and to pass two resolutions. The proposed resolutions to be passed was relating to the removal of Mr. Cyrus Mistry and removal of Mr. Nusli Wadia from the board of directors of TCL. Similar communications were also addressed to Tata Motors Limited and Tata Steel Limited. The requisition submitted by TSL was also accompanied with a special notice (Special Notice), as required under the provisions of Section 169(2) of the Companies Act. The Special Notice *inter-alia* stated that Mr. Wadia was acting in concert with Mr. Mistry and against the interests of TCL and he had put the interests of TCL in jeopardy.

This Special Notice was the main point of contention between the parties.

Mr. Wadia alleged that the Special Notice was *per se* defamatory and no due diligence was conducted by the Petitioner to ascertain whether the allegations are true or false before the issuance of the Special Notice containing the imputation. Further, Mr. Wadia responded to the Special Notice on 21 November 2016 and on 23 November 2016. Group General Counsel of TSL responded to the same, seeking withdrawal of the replies by Mr. Wadia. Mr. Wadia thereafter sought to make a representation to the shareholders of TCL in accordance with provisions of Section 169(4) of the Companies Act. In this representation, Mr. Wadia urged the shareholders of TCL to decide his fate as an independent director and offered an explanation to the Special Notice issued by TSL.

On 23 November 2016, the Board of Directors of TCL approved the convening of EGM and accordingly issued the notice of EGM to be held on 23 December 2016, alongwith the explanatory statement as required under the provisions of Section 102 of the Companies Act. Alongwith the explanatory statement for holding the EGM, TCL also issued the Special Notice given by the requisitioner, TSL, with a view to provide the relevant background concerning the removal of Mr. Wadia as a director of TCL, to the shareholders of TCL. TCL further informed the shareholders that Mr. Wadia proposes to make a written as well as oral representation and if time permits, the written representation will be circulated.

At the EGM held on 23 December 2016 resolution was passed, removing Mr. Wadia as a director of TCL. On 23 December 2016, Mr. Wadia filed a complaint in the Court of Additional Chief Metropolitan Magistrate, Mumbai (Magistrate) alleging that the Petitioners had defamed the Mr. Wadia by issuing the Special Notice and the same is based on false, baseless and unsubstantiated imputation which have been published with a view to damage and tarnish his reputation and goodwill. The Magistrate passed an order issuing process on 15 December 2018. This order, issuing process was challenged by the Petitioners in the present writ petition.

The Petitioners argued that the Special Notice was issued in furtherance to the statutory requirements before taking action for removal of director under Section 169(2) read with Section 115 of Companies Act and as the action of Special Notice fell within the four corners of the Companies Act and the Rules framed thereunder, the same cannot be held to be *per se* defamatory. It was also alleged that Mr. Wadia had not availed the remedy under Section 111 of the Companies Act where on an application, the Central Government could hold that the right to issue the Special Notice was being abused to secure needless publicity for a defamatory matter. It was also argued that by seeking to circulate his representation under Section 169(4) of the Companies Act, Mr. Wadia had consented to the circulation of the Special Notice and thus the same was not defamatory.

Mr. Wadia contended that the Special Notice was responded to on 21 November 2016 and further representation was also made on 23 November 2016, therefore it could not be said that he had consented to the circulation of the Special Notice. It was further alleged that the allegations contained in the Special Notice were defamatory and at no point prior to 10 November 2016, the independence and impartiality was questioned.

JUDGMENT

The Bombay High Court held that the Petitioners cannot be held liable since the statutory scheme itself contemplates that the notice convening EGM should be accompanied by a brief statement of information and facts that would enable the members to understand the meaning, scope and implication of the items and business to be transacted in the meeting and to take a decision.

The Bombay High Court further held that as the Petitioners have included a statement in the form of Special Notice in exercise of statutory obligation under Section 169(2) of the Companies Act, there is no *mens rea* to constitute the offence. The Court also noted that as the Special Notice was sent by TSL, the shareholder of the respective Tata

companies, the directors / officers of TSL cannot be held vicariously liable and no malice can be attributed to the Petitioners, as TSL is a corporate entity.

It further stated that the Special Notice had to be referred in the background in which it was made, namely in relation to the conduct of the independent director who is sought to be removed by the company, which is empowered to remove its director after following the procedure prescribed under the Companies Act and as the Petitioners had adopted the available legal recourse under the law, the same could not be termed as *per se* defamatory. Another factor that weighed with the Bombay High Court was that Mr. Wadia had not challenged his removal before any court of law.

It was also held that since the publication was only limited to the board of directors of the respective Tata companies and the respective shareholders of these companies, it could not be said that it was circulated widely over a section of the general public, so as to constitute as defamation.

The Bombay High Court referred to several well-established authorities to hold that the order summoning the accused persons must reflect that the Magistrate has applied his mind and even though it is not necessary to be detailed order, the Magistrate must be *prima facie* satisfied that there are sufficient grounds for proceeding against the accused. Therefore, the order issuing process was quashed. [Ref: *Subramanian Swamy v Union of India (2016) 7 SCC 221; Birla Corporation v Adventz Investments and Holdings, (2019) SCC Online 682*]

COMMENTS:

This decision is an affirmation of established shareholder rights and statutory corporate principles. It has recognized shareholder participation through statutory mechanism whilst ensuring adequate safeguards against criminal litigation.

This judgment has conclusively recognized that communication in the course of exercising statutory rights will not be construed as defamation. More pertinently, the fact that despite communication to the board of directors and shareholders was not construed as communication to the general public is a welcome step. The fact that the Bombay High Court emphasized on the background of the communication as opposed to weighing the same on an independent footing of defamation, is salutary. Whether this judgment is further appealed to the Supreme Court of India, remains to be seen.

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