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Case Analysis of MacKinnon Mackenzie & Co. Re, (1967)

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I. BACKGROUND OF THE CASE

On 2nd November, 1965 the company named MacKinnon Mackenzie & Co. private limited situated at 16, Strand Road Calcutta has made an alteration in the company's memorandum of association for the purpose of shifting the company's head office from Calcutta to Bombay by passing a special resolution in accordance with section 189 of the Companies Act, 1956 in the general meeting which was held by the company, then the company subsequently after making due notices as per the act it unanimously came to an abiding decision as per which the memorandum of association of the company was altered by the deletion of clause 2 therefrom and by substituting the following clause with that "the registered office of the company will be situated in the state of Maharashtra" which would enable the company to carry on its business on a large scale with a more efficient and effective manner as said by the directors and shareholders of the company who considered it as a necessary and desirable step but this was contested firmly by the state of West Bengal and the Registrar of Companies when the application for the alteration was submitted before it with a view that the transfer of registered office would amount to the state of West Bengal a hefty loss of revenue as well as employees' conditions were exposed to a greater height of risk that compels to take necessary steps for protecting their interests and as aggrieved by this immense step the company filed a petition for granting the resolution which was favored by the court and the resolution was granted, with a view that the state has no locus standi.

II. LAWS RELATED TO ALTERATION IN MEMORANDUM OF ASSOCIATION

Memorandum of association is considered as a charter of any company as per whose instructions all other rules and regulations are formed which are abiding in all respects including articles of association. The present case was previewed as per the sections 17 of the Companies Act, 1956³ which lays down the provisions regarding the Special resolution and confirmation mandate by

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³ Section 17 in The Companies Act, 1956

Company Law Board required for alternation of memorandum⁴.

(1) the company may alter the provisions of its memorandum with respect to changing the place of registered office from one state to another or with the objects of the company by passing a special resolution which is further subjected to the fulfillment of certain criteria and those should enable the company

- (a) to carry on its business more economically or more efficiently;
- (b) to attain its main purpose by new or improved means;
- (c) to enlarge or change the local area of its operations;
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company;
- (e) to restrict or abandon any of the objects specified in the memorandum;
- (f) to sell or dispose of the whole, or any part, of the undertaking, or of any of the undertakings, of the company; or
- (g) to amalgamate with any other company or body of persons.

(2) The alteration shall not take effect until, and except in so far as, it is confirmed by the company law board on petition.

(3) Before confirming the alteration, the Company Law Board must be satisfied-

(a) that sufficient notice has been given to every holder of the debentures of the company, and to every other person or class of persons whose interests will, in the opinion of the Company Law , be affected by the alteration; and

(b) that, with respect to every creditor who, in the opinion of is entitled to object to the alteration, and who signifies his objection in the manner directed by the Company Law Board either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the 1 Company Law Board]: Provided that the 1 Company Law Board] may, in the case of any person or class of persons, for special reasons, dispense with the notice required by clause (a).

(4) The Company Law Board shall cause notice of the petition for confirmation of the alteration to be served on the Registrar who shall also be given a reasonable opportunity to appear before the Company Law Board and state his objections and suggestions, if any, with respect to the

⁴ Section 17 in The Companies Act, 1956, <https://indiankanoon.org/doc/1513155/>, Accessed on 24th april, 2020

confirmation of the alteration.

(5) The Company Law Board may make an order confirming the alteration either wholly or in part, and on such terms and conditions, if any, as it thinks fit, and may make such order as to costs as it thinks proper.

(6) The Company Law Board shall, in exercising its powers under this section, have regard to the rights and interests of the members of the company and of every class of them, as well as to the rights and interests of the creditors of the company and of every class of them.

(7) The Company Law Board may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the 2 for the purchase of the interests of dissentient members; and may give such directions and make such orders as it thinks fit for facilitating, or carrying into effect, any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase.

III. FACTS IN ISSUE

An application has been filed by the company seeking order in the favor of its resolution to alteration which was opposed by the the state and the registrar , Further, the applicant put forth all the valid points before the court giving clearance of reasons for alteration

Now the, question before the court is to determine whether the State has any locus standi in the current subject matter to contest the application?

Whether the claims by the state are appropriate in the context of law?

IV. PETITIONER'S ARGUMENT

It is that the major part of the business of the company is now carried on at Bombay and not at Calcutta

The number of services from or through Calcutta were considerably larger The company operates numerous services in Bombay as the company services are performed under British India Steam Navigation Company Limited and those services are Bombay/Gulf Passenger Service, India/Africa Cargo and India/Africa Passenger Service, Africa/India Cargo Service, India/Straits Passenger/Cargo Service and Far East/Gulf Cargo Service whereas In Calcutta office of the company, it amounts merely operation of four services, namely, Bay of Bengal/Far East and India/Australia, Gulf/Australia and India/New Zealand services⁵.

The transfer of the registered office from Calcutta to Bombay would bring greater economy in

⁵ Mackinnon Mackenzie & Co. vs. Unknown,[1967] 37 CompCas 516 Cal, [6]

the management of the company and It would be administratively more convenient that the secretarial work involved should be regulated by the bombay office specifically as the chairman of the board of directors and the secretary of the company reside in Bombay which would help.

The number of calls of ships is larger at Bombay and the number of employees is larger at Bombay

There is the estate of the company at Bombay and the market value thereof is Rs. 50, 00,000 whereas the Calcutta leasehold interest of the company will expire in 3 years' time.

V. RESPONDENT'S ARGUMENT

The main contentions on behalf of the State of West Bengal and the Registrar of Companies are that there will be greater loss cause to the public interest in relation to revenue interest as well as the employment problem of the State due to the retrenchment of staff which would increase unemployment in West Bengal.

The assessment of tax depends on the situation of the registered office and if the registered office is transferred the allocation of the company the State of West Bengals tax collection amount will be reduced and there would be loss of revenue.

The petition does not show that any economy will be made by the proposed transfer of the registered office to Bombay

The resolutions are not validly passed and the notice in respect of the resolution suffers from the vice of lack of material particulars i.e. there is lacunae in following the provisions mentioned in the section 17.

VI. DOES STATE CAN BE CONSTITUTED AS A PERSON UNDER SEC 17?

As contemplated by the state that the provisions laid down in sec 17 has not been fulfilled in its real manner by the petitioner which can be traced on the basis following observations which emphasizes that under sec 17 company act ,it has been stated that a company may by special resolution alter the provisions of its memorandum with respect to change the place of its registered office from one state to another and further in the various sub – section it has been stated that alteration shall not take effect until it gets confirmation from the court and before confirming the alteration the court must be satisfied that sufficient notice has been served to every person whose interest and will is supposed to get affected by this alteration which also includes every debenture holder of the company but person It should be stated here that Sub-section (4) of Section 17 of the Companies Act specifically mentions notice of the petition on

the Registrar. The State is not mentioned separately and it is contended on behalf of the petitioner that the State is not a class of persons contemplated in Section 17⁶. **the section 17 doesn't give any clear picture of the stance of state it abruptly Fails to point out state as a person which is neither mentioned separately nor defined as a different class of** The court taking a different view still pursuant to the application imparted notice to the state mankind sure no dues are left which apparently might have owed by the company.

VII. DOES THE STATE CAN PUT ANY OBJECTION REGARDING NOTICE?

It would not be proper to lay down any hard and fast rule as to when and under what circumstances it will be in the opinion of the court desirable to give notice to any particular person including the State. The council on behalf of the state was of the view that state should be considered as a class of persons as the State represents the interest of the public referring. Subsequent to it the state has been presented with a notice it demanded that it deserves to be heard to which the court replied it is acceptable to give notice to the state in order to unfold whether any revenues are due and owing to the state but it's not going to accept any abstract and inflexible propositions that the state has a right of its own to be heard as the section 17 does not speak that the state as an entity is entitled to notice or to be heard

Counsel for the State relied on the observation at of the report that the Indian Constitution is of a federal type and each unit of the federation has exclusive fields of State activity and is entitled to develop its State in its own way and the interests of the State are to be taken into account and are of considerable importance in confirming special resolutions of the companies if they have adverse effect on the interests of the State concerned.

In the other decision, In the Matter of Orissa Chemicals and Distilleries Private Limited,⁷ it was held that the State of Orissa was a person whose interests would be affected by the alteration and was therefore entitled to be heard. But as the court has already indicated that it will depend on the facts and circumstances of each case as to whether the State comes within the clause of Section 17(3) to be entitled to notice. In Orissa Chemicals and Distilleries Limited case there was the sales-tax aspect and this naturally brought the State within the class of creditors who were entitled to notice.

In view of the fact that there is notice to the State in the present case, the State is indisputably bound to be heard. That right cannot be denied but The question as to what extent the State will be entitled to prefer its objections is quite a different aspect which vary from case to case.

⁶ Mackinnon Mackenzie & Co. vs. Unknown, [1967] 37 CompCas 516 Cal, [14]

⁷ Orissa Chemicals And ... vs. Unknown, AIR[1961] Ori 62,

VIII. STATEMENT OF REVENUE OF LOSS

In the case of *Orient Paper Mitts Limited v. State*⁸, the objections on behalf of the State of Orissa were, that the change of office would affect the revenue of the State with reference to income-tax and sales-tax. The contention was examined with reference to the amount of income-tax paid by Orient Paper Mills Limited and an observation was made that the State of Orissa would lose a considerable portion of the contribution of the Central Government from out of the income-tax realized through the State. It was also held that the proposed alteration of the memorandum in the Orissa case affected the revenue of the State of Orissa to a considerable extent. In the other case of Orissa Chemicals and Distilleries Private Limited, the State of Orissa contended that considerations of income-tax, sales-tax, etc., were open to be canvassed by the State in opposing an application for change of registered office. It was also held in the case of Orissa Chemicals and Distilleries Private Limited that the question of loss of revenue of income-tax was a relevant consideration. It is significant that when the registered office of Orient Paper Mills was changed from Bengal to Orissa there was no objection to loss of revenue.

The contention that the State has not given particulars of loss of revenue must be upheld in the facts and circumstances of this case because there is no suggestion as to what loss in revenue will be. The court was of the view that the question of loss of revenue would be completely irrelevant because the union of India was to be considered as an entirety and it would be unfair parochial to speak of loss of revenue to any particular state because in the ultimate analysis what might be loss to one state would be gain to another

State and the loss would be neutralized by gain and there would never be loss to the totality as a whole if interest of a State is at all relevant, then interests of both States should have to be considered by a court of law.

IX. INTEREST OF PUBLIC

In *Poole v. National Bank of China Limited*⁹, Lord Macnaghten said that a company limited by shares may by special resolution modify the conditions contained in the memorandum and reduce its capital and the exercise of the power was fenced round by safeguards which were calculated to protect the interest of creditors, the interest of shareholders and the interest of the public. Counsel for the State relied on the observations of Lord Macnaghten that the exercise of the power was fenced round by safeguards which were calculated to protect the interest of

⁸ Orient Paper Mills Ltd vs. The State Of Orissa And Others, [1961]AIR 1438

⁹ Poole v. National Bank of China Limited, [1907] UKHL 616,

the public and that the public were, therefore, entitled to be represented and the State was entitled to be heard in the interest of the public.

As the present case arose wholly out of the concern by the state for protecting the public interest which was in relation to revenue interest and interest in the employment problem of the State that was subjected to greater risk as claimed by the state.

X. NOW THE QUESTION IS WHAT THE INTEREST OF PUBLIC MEANS?

This can be answered by the observation made in *Westburn Sugar Refineries Limited*¹⁰

"in that case the question was embarked upon reduction of capital by repaying some paid-up share capital. If the transaction is itself competent, the court should only refuse its confirmation if what is proposed to be done is somehow unfair or inequitable, and the consideration of what is unfair and inequitable cannot well extend beyond consideration of the interests of creditors, shareholders and the general public, by which term is, the court interpreted as the persons who may in the future have dealings with the company or may be minded to invest in its securities."¹¹

These observations show beyond any reasonable doubt that the interest of the public in regard to reduction of capital referred to such persons as in future would have dealings with the company or the shareholders. Those are not the rights that the State appears for in the present case.

The court was of the view that in any way it doesn't want to narrow down the definition of public interest but the present case only requires abundant focus to scrutinize the facts keeping in mind which somewhat closely describes the position of those who may, in future, form connections with the company as creditors or shareholders.

XI. FOREIGN LAWS AND INDIAN LAWS

"The Registrar of Companies should be served with notice of and has a right to appear and be heard on applications to confirm alterations of objects and like proceedings in which his records are involved"¹² but Indian law i.e. provision of company act sec 17 even a clear picture whether the state has any stance to get the notice rather it provides discretionary power to the court which serves the notice as per the demand of the case. Though it is compelled

¹⁰ *Westburn Sugar Refineries Ltd* [1951] AC 625

¹¹ *Mackinnon Mackenzie & Co. ... vs. Unknown*, [19]

¹² THE LAW, PRACTICE AND PROCEDURE ON ALTERATION OF MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY IN TANZANIA., <https://breakthroughattorneys.com/alteration-memorandum-articles-association-company-tanzania/>, Accessed on 24th april, 2020

to get approval from the registrar but it doesn't have absolute right getting heard.

XII. CRITICAL OVERVIEW OF THE JUDGMENT

The cases of alteration of objects of the company have usually been decided with regard to two broad principles. Firstly, it is a matter which primarily concerns its members and creditors and if these classes of people including the debenture-holders do not object, alteration of objects is permissible. Secondly, if it is not shown to the court that there is any objection to the case of alteration of objects, it is also permissible to alter the objects.

In the case of *Parent Tyre Company Ltd*¹³ an alteration of objects was sought for to carry on the business. It was held that it was essentially a business proposition whether an additional business could or could not be conveniently or advantageously carried on under existing circumstances with the existing business of the company. The limitation that could be put upon such an additional business was that it should not be destructive of or inconsistent with the existing "business."

The decision in *Parent Tyre Company* case illustrates what is known as the business wisdom of the shareholders and members of the company and the court usually does not disturb such business propositions of the company unless there are other objections.

The State had no locus standi to object on the question of loss of revenue and the State could only resist as an ordinary person and not in advancement of revenue interest.

The right of a State as such to appear in applications under Section 17 of the Companies Act does not flow from the provisions of the section. I am of opinion that there is no statutory right of the State as a State to intervene in applications under Section 17 of the Companies Act with regard to change of registered office. If notice has been directed by the court to the State, the State appears pursuant to the notice. If notice is given to secure whether revenues have been paid or not, the court in exercising its discretion sees that a company before removing its office from one State to another does not leave liabilities to the State undischarged. The court in making an order can impose terms to secure discharge of such liabilities. It is true that the decisions of the Orissa High Court have considered the contentions advanced by the State as to the possibility of loss of revenue and have held such matters to be relevant in the consideration of change of office. In my opinion, no hard and fast rule can be laid down that under no circumstance it is open to the State to contend that there may be loss of revenue. Suppose a large number of companies desire to change their registered office from one State

¹³ *Parent Tyre Co. Ltd.*, (1923) 2 Ch. 222

to another, it may be open to the State to contend the possibility of disturbance in the economy of the State. In the ultimate analysis, the question of revenue, if it falls for consideration, is to be considered on the basis of the integrity of the Republic of India and not in a sectional and parochial manner.

In the present case, as far as the shareholders are concerned, they are only two in number and they have signified their consent and their interests are protected. With regard to the contention on behalf of the State as to the possibility of loss of revenue, I am of opinion that the facts and circumstances of the present case do not indicate any materials on which it can be said that there is any loss of revenue, secondly, if there is any possibility of loss of revenue to one State there is the corresponding likelihood of gain of revenue to another State, thirdly, justice demands that in considering applications under Section 17 for change of registered office from one State to another, the matter should be looked at from the point of view of the Republic of India as a whole and not for advancement of local or sectional interest. Fourthly, the question of income-tax raises the discussion as to where the income-tax is being assessed.

It was said on behalf of state that the fixed assets at Calcutta were of higher valuation than the assets at Bombay. The Bombay property belongs to the company. The Calcutta property is leasehold interest of the company and the lease is to expire within three years. It therefore follows that the Bombay property is of much greater value.

Counsel for the petitioner rightly contended that the economy that was to be achieved would be a matter for the future and it was not possible to give details of the working of the company in the future. In the case of *Taldia Rubber Company Limited*,¹⁴ the objects of the rubber company were in wide terms. The company for several years carried on business of a rubber estate. The company sold the rubber estate. There was an application for winding up of the company on the ground that the substratum had gone. It was held that on a true construction of the memorandum it was impossible to conclude that the company had been formed solely to work the rubber estate and therefore the sale of the rubber estate did not result in a destruction of the substratum. Reference was made in *Taldia Rubber Company Case* to the observations of Lord Greene M.R. in *In Re Kitson and Company Limited*,¹⁵ where a question arose as to whether there was a real and bona fide intention to reembarc in the engineering business. Lord Green said that it might be supposed that at the time of sale of the Kitson business so far as the board was concerned they thought that there was no change and that it was not desirable for the company ever to start again into engineering. Supposing afterwards the directors changed

¹⁴ *Taldia Rubber Company Limited*, [1946] 2 All E.R. 763

¹⁵ *re Kitson and Company Limited*, [1951] 1 All E.R. 881

their mind and they saw a profitable opportunity of using the company's money again in the engineering business. Lord Greene said that such intention had nothing to do with the question whether the substratum of the company had gone or not. Relying on those observations Wynn-Parry J. said in *Taldua Rubber Co.'s case*;

Referring to Those observations (*meaning thereby the observations of Lord Greene M.R.*) the judge held that this case with it applies with full force and effect. Apart from authority, it appeared to him(judge) that the common sense of the matter demands that the existence or non-existence of a concrete scheme at the time the petition comes before the court should be regarded as a wholly irrelevant matter, otherwise it would be impossible for the court to draw any The court clearly is not called on to adjudge the merits or demerits of any scheme, and this fact appears to me to make the consideration by the court of the existence or non-existence of a particular scheme all the less fruitful."

XIII. CONCLUSION AND SUGGESTION

It can be well understood the judgment was preferably made with a view to make the stance of state clear for future which was seen to be holding a doubtful position regarding its right to contention and notice. The judgment straight out stresses on the point that companies should keep themselves as first priority as it survives then only it can work for the welfare of the employees and it can be observed from the above analysis that if the company would have been in Calcutta the probability of yielding profit was much lower and all the favorable circumstances for the growth of the company as well as its members lies with the shifting of registered office from Calcutta to Bombay , the only aspect which remain which remain irresolute is as mentioned the state doesn't have absolute right to be noticed and heard , it all depends of the case , the judgement should have broadly traced out the dimensions within which the state are supposed to avail such rights.
