
(1985) 11 MAD CK 0022
In the Madras High Court
Case No : O.S. Appeal No. 72 of 1985

A. Brahmaraj

APPELLANT

Vs

Sivakumar Spinning Mills Pvt. Ltd., Tirunelveli-6 and others

RESPONDENT

Date of Decision : 08-11-1985

Acts Referred:

Companies Act, 1956 — Section 396, 397, 397(1), 397(2), 398
Limitation Act, 1963 — Section 22
Telegraph Act, 1885 — Section 16(3)

Citation : (1985) 11 MAD CK 0022

Hon'ble Judges : Singaravelu, J; Ramaswami, J

Bench : Division Bench

Advocate : V.P. Raman for M/s. Krishna Srinivasan and V. Ashok, for the Appellant; T. Raghavan, for the Respondent

Final Decision : Allowed

Judgement

V. Ramaswami, J.—This is an appeal against the order of a learned single Judge of this Court dismissing a petition filed under S. 397 and S. 398 of the Companies Act, hereinafter referred to as the "Act". The learned Judge did not go into the merits of the case but dismissed the petition on three grounds. Firstly, the learned Judge was of the view that the appellant, who filed the petition did not possess the statutory qualification under S. 399 of the Act, secondly, the petition is barred by limitation and thirdly, neither the relief prayed for could be brought under S. 397 or S. 398 nor the averments in the petition satisfied what is required by S 397 or S. 398 of the Act. The first respondent is a private company limited by shares and incorporated under the Companies Act. The nominal capital of the Company is Rs. 25 lakhs divided into 2,50,000 equity shares of Rs. 10 each. The issued and authorised capital is Rs. 7 lakhs divided into 70,000 equity shares of Rs. 10 each. It is a spinning mill carrying on business in the manufacture of yarn. The petition was filed by the appellant herein praying for the following reliefs :-

(a) to set aside the resolution alleged to have been passed at the so-called Board Meeting on 30th July, 1978,

(b) to injunct permanently the first respondent from recognising and the respondents 2 to 11 or their agents from exercising or claiming any rights in respect of the allotment allegedly made on 30th July, 1978;

(c) to convene the Annual General Meetings for the years 1978 to 1982 to consider the balance sheet and other routine businesses;

(d) to permit the petitioner and the consenting trial shareholders who gave a requisition for the ex-ordinary general meeting to convene the meeting for the election of Managing Director;

(e) to compel the second respondent and his group of share holders to sell the shares lawfully held by them to the petitioner and his group of shareholders or their nominees at a price to be fixed by this Hon"ble Court.

It may be mentioned that by the impugned resolution four of the directors who have constituted and formed one group purported to allot certain shares to themselves and a few others of their group. The validity of the meeting of the Board of Directors in which this resolution is purported to have been passed and the factual alleged allotment as also the legal validity of such allotment are questioned in the petition.

2. The petition was filed by the appellant for himself and on behalf of the shareholders, whose names and other particulars are set out in the schedule to the petition. It is seen from the schedule that as per the Share Register of the company there are 23 members holding shares. Fifteen of the members holding a total number of 39,400 fully paid shares have given their consent for filing the petition. Of these fifteen members one is the appellant himself. The appellant's two minor sons were holding 1100 shares each. In the Register of Members these minor sons are shown separately as members and represented by their father and guardian. Another minor by name R. Nagendran is also shown as a member of the company represented by the appellant as guardian. It was the case of the petitioner that by reason of the consent given by the persons, whose names are shown in the schedule, he was entitled to file the petition. He has also filed the letters of consent along with the petition. It may be seen from this that the appellant along with the members shown in the annexure, collectively owned not less than one-tenth of the issued share capital of the company. It is found that out of the total number of 23 members in addition to the petitioner, 15 other members have also given their consent making it not less than one tenth of the total number of members. The consent letters given by the 15 members shown in the annexure are identical and they read as follows:-

I, the undersigned and shareholder of Sivakumar Spinning Mills Private Limited, Tirunelveli, holding 10,000 equity shares of: Rs. 10 each fully paid up, do hereby accord my consent to the filing of a petition under S. 397 and 398 of the

Companies Act, 1956 by Mr. A. Brahmaraj, s/o Sri P.K S.A. Arumuga Nadar, No. 75, P.K.S. Street, Sivakasi, against the company and/or the shareholders namely, Mr. N. Easwaramoorthy, Mr. Shankarasubbu, Mr. Gopalakrishnan and Mrs. E. Rukmani Ammal and or severally and or any other share holders or persons whom in the opinion of the said Mr. A. Brahmaraj, are necessary parties for obtaining reliefs claimed in the proposed petitions. I also do hereby authorise and empower Mr. A. Brahmaraj to take out any such application as the said Mr. A. Brahmaraj may "deem fit and necessary in the above petition and to file any appeal against any order passed by the Hon"ble Court in the said petition or in the application. I further agree and undertake to confirm and ratify all acts, deeds and things done by the said Mr. A. Brahmaraj.

3. The first question for consideration in this appeal, therefore, is whether the statutory requirements prescribed under S. 399 of the Act for filing a petition under S. 397 or S. 398 are satisfied in this case. C1s. (1), (2), and (3) of that Section which alone are relevant for our purpose read as follows:-

399. (1) The following members of a company shall have the right to apply under S. 397 or 398: -

(a) in the case of a company having a share capital, not less than one-hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

(b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) For the purpose of sub-S.(1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member;

(3) Where any members of a company are entitled to make an application in virtue of sub-S.(1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

It may be seen from the first part of clause (1) that in order to qualify a right to apply under S. 397 or 398, the number of members to come before Court should be not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less. Under the second part any member or members holding not less than one-tenth of the issued share capital of the company can file an application under S. 397 or 398 of the Act. We are not concerned with clause (b) as the first respondent company is a company having a share capital within the meaning of S. 399. It may be seen from the two alternatives provided that if the petitioner satisfies any one of the alternatives or both, he will be entitled to file a petition under S. 397 or 398 of the Act. Under C1.(3) it is stated that where any members of a company are

entitled to make an application in virtue of sub-S(1), any one or more of them having obtained the consent in writing of the rest may make the application on behalf and for the benefit of all of them.

4. Mr. T. Raghavan, learned counsel for the respondents contends that this provision enabling one or more of the members filing a petition having obtained the consent in writing of the rest, would apply only to the latter part of C1.(a) in order to satisfy the condition relating to the holding of not less than one-tenth of the issued share capital and not to the earlier part relating to the number of members who could join and file a petition. We do not find any reason as to why this restricted meaning should be given to C1.(3). The opening words of C1.(3) refer, "where any members of a company". The plurality of members referred to in this (sic) provision definitely will also refer to the first part of C1.(a), so that if one member files a petition with a valid consent letter in writing from 99 other members or such number of other members so as to constitute not less than one-tenth of the total number of members, certainly, the petition would be maintainable under S. 397 or 398 of the Act. C1s.(3) also refers to an application in virtue of sub-S.(1) and it does not restrict its application to the latter part of C1.(a). In fact, it will also include C1.(b) which related to the number of members and not to the share-holding. Therefore if there are valid written consent letters for filing an application under S. 397 or 398 of the Act and the total number of such members including the petitioner satisfied the condition relating to not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, the petition would be clearly maintainable. However, in all the cases, the consent letter should be in writing as contemplated under C1.(3) of S. 399.

5. The learned Judge in the order under appeal with reference to the consent letters, which we have extracted above, held that the consent letters were not valid and are not in compliance with S. 399 (3) of the Act. The learned Judge came to this conclusion on the ground that "consent" as contemplated under the provision is consensus-ad-idem, that unless the consenting party knew the sum and substance of the petition before he consented for filing of the same, it could not be said that there is a consensus-ad-idem. The learned Judge has given a number of reasons for coming to this conclusion. In *M.C. Duraiswami v. Sakthi Sugars Ltd.* a Division Bench of this Court has held that "consent in writing" contemplated in S. 399 (3), of the Act, is a consent to the filing of a particular petition with a particular allegation for a particular relief under S. 397 or S. 398 or under both, and that there cannot be a blanket consent like a certain member or members consenting to some other member filing a petition under S. 397 or S. 398 or under both. Learned counsel appearing for the appellant in that case—relied on the decision of a Division Bench of the Calcutta High Court reported in *In re Bengal Laxmi Cotton Mills Ltd.* 35 Company Cases 187 to contend that it was not necessary to have the actual petition to be filed prepared before the consent is obtained for filing such petition. The Division Bench of this Court accepted" the contention that there need not be a petition already prepared

before the consent in writing was given by the members, but however, the Bench has observed that the consenting members should have known the particular relief sought to be prayed and the ground on which that relief was sought to be prayed and only then it could be said that they have applied their mind to the question before them. A mere consent for filing an application under S. 397 or S. 398 or under both without any particulars such as, the nature of the allegation or complaint made on the petition and the nature of the relief sought to be claimed in the petition cannot be the result of an application of the mind to the question before them and therefore, such a consent cannot be a valid consent, the Bench went on to observe. It is not necessary for us to go into this question as the point raised by Mr. V.P. Raman, learned counsel for the appellant on this part of the case relating to the maintainability of the petition is different. He contended that there were only 23 members in the company and a petition can be filed by not less than three members. In this case, the petitioner is a member of the company. As already stated, two of his minor sons are also members holding through their father and guardian separately shares in the company. They will be considered as two separate members. Another minor by name Nagendran was holding 900 shares and the petitioner is shown as a guardian for that minor in the Share Register. Thus, three of the members who have given consent are the two minor sons of the petitioner and minor Nagendran.

6. In respect of these minors, the petitioner himself has signed the consent letters as father and guardian in respect of his of minor sons and as guardian in respect of Nagendran. The argument of the learned counsel for the appellant is that even if the consent could not be stated to be valid in respect of the other members, the consent given by the petitioner as guardian of the minors, could not be questioned as the question of consensus ad idem would not arise in such a case. The three minors represented by the guardian and the petitioner, make a total number of four members as against the total of 23 members which satisfies the first part of S. 399 (1) (a) of the Act. There could be no doubt that in the case of a minor, the guardian has authority to give consent. In a broad sense, every person who is required to exercise any right or privilege is required to apply his mind. But if a person had appointed an agent and thereby had authorised the agent to apply his mind, the application of the mind by the agent becomes the relevant factor as held in *Killick Nixon Ltd. v. Bank of India* 1982 TLR, 2547. Similarly, in the case of a minor, the application of the mind by the guardian is the relevant factor. When the petitioner as guardian of the minors had given consent to his filing a petition under S. 397 or 398, it is impossible to argue that he did not understand what the consent he gave for and there was no consensus ad idem.

7. It may also be mentioned that in Paragraph 7 of the petition the appellant has stated that he was filing the petition for himself and on behalf of the shareholders whose names and other particulars are set out in the schedule thereunder. The names of the three minors and their share holding are also set out. Merely because he had stated that the petitioner and the consenting share-

holders held 39,900 shares of Rs. 10 each aggregating to Rs. 3,99,000 which represents more than 10 percent of the paid-up capital, it cannot be said that he is filing the petition only in exercise of the powers found in the latter part of S. 399 (1) (a) and not the earlier part. That was one statement of fact which he had to make and he had made it. In fact, in a case where the petitioner files a petition for himself and on behalf of the minors for whom he is the guardian and he had set out the names of the minors in the schedule and made a reference in the main part of the petition as filed for himself and on behalf of those minors also, there would not be even any necessity to make them as eo-nomine parties. They would be deemed to be eo-nomine parties and even without a formality of producing a formal consent letter he could have filed a petition for those minors also. This part of the case was not considered by the learned Judge in his order. However, we find that the learned Judge was aware of the issue and in fact, in paragraph 2, after referring to the need for the petitioner and other consenting parties collectively owning not less than one-tenth share of the issued share capital of the company in order to maintain the petition under S. 397 or 396 stated. ""for the present, I am excluding the other alternatives visualised under the said provision". The other alternative visualised under S. 399 (1) is filing of the petition by a member or members without reference to their share-holding. Though he made this reservation in this part, he omitted to consider this question. We are also of the view that in matters like this it is not the pleading that matters, but the factual compliance with the provisions S. 399 that is relevant. Even if the petitioner did not clearly refer to the filing of the petition or satisfying the earlier part of S. 399 (1) (a), if factually that condition is satisfied we cannot hold that the petition is not maintainable.

8. In fact, the decision of the Supreme Court reported in *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, related to a case of a member applying with the consent in writing of not less than one-tenth of the number of members. If the petition could not have been maintained the learned Judges of the Supreme Court would not have gone into the question as to whether the withdrawal of consent by some of them would affect the maintainability of the petition itself.

9. For the foregoing reasons, there could be no doubt that the provisions of S. 399 of the Act are satisfied in this case and the petition is accordingly maintainable.

10. The next question for consideration is whether the petition is barred by limitation. The learned Judge has held that the petition is barred by limitation on the ground that in the relief prayed for the appellant had sought to set aside the resolution dated 30th July, 1978 and an injunction restraining the first respondent/company from recognizing respondents 2 to 11 or permitting respondents 2 to It exercising or claiming any rights in respect of the allotment allegedly made on 30th July, 1978. The learned Judge was of the view that Art. 137 of the Schedule to the Limitation Act, 1963 would apply in the case of a

petition under S. 397 or 398 of the Act and unless it is specifically pleaded that the petitioner had no knowledge of the said resolution he should be deemed to have knowledge even from the date of resolution. In that view, the learned Judge held that the petition filed beyond three years from the date of the resolution or from the date of "knowledge is barred by limitation.

11. S. 397 (1) refers to a complaint that the affairs of the company are being conducted in a manner prejudicial to public interest, etc. The emphasis is on "being conducted". S. 397 (2), provides that if the Court is of opinion that the company's affairs are "being conducted in a manner prejudicial to public interest or in a manner oppressive to any members" the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. The relevant words to be noticed are the words "with a view to bringing to an end". Similar words are used in S. 398 (1) and (2) also. These Sections therefore refer to a continuing wrong and the need for bringing to an end to the matter. The Supreme Court in *Santhi Prasad Jain v. Kalinga Tubes Ltd.* 35 CC 351 considered the scope of Ss. 397 and 398 and held thus:

It is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of S. 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to S. 397.

There could, therefore, be no doubt that the oppression or the conduct of the affairs of the company in a manner prejudicial to the public interest has to be continuous and shall have persisted upto the date of the filing of the petition under S. 397 and/or 398 of the Act. If the state of affairs existing on the petition is the main criterion for invoking the jurisdiction under Ss. 397 and 398 and the oppression complained of, or the conduct of the affairs complained of, should be existent on the date of the petition as in the case of a continuing wrong and the relief asked for is only with a view to put an end the matters complained of, we are unable to see how any question of limitation could arise at all. The learned counsel for the respondents relied on *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, , and *Hunger fold Investment Trust Ltd. Re. v. Turner Morrison & Co. Ltd.* I.L.R 1972 (1) Cal. 246, in support of the contention

that the residuary Art. 137 of the Schedule to the Limitation Act would apply to proceedings under Ss. 397 and 398 of the Act. The decision reported in Kerala S.E. Board case related to the applicability of Art. 137 of the Limitation Act to a petition filed under S-16 (3) of the Telegraph Act claiming enhanced compensation. The Board constituted under S. 5 of the Indian Electricity Supply Act, 1948, removed certain standing trees on the property of the respondent, therein for the purpose of laying electric line from Calicut to Cannanore. The Board assessed the compensation at a certain amount, S. 16(3), of the Indian Telegraph Act, 1885, conferred a right on a person who is aggrieved by the fixation of compensation to file a petition before the District Judge for enhancement of compensation. With reference to a petition filed under S. 16 (3), of the said Act, the question that arose for consideration was what was the limitation. The Supreme Court has held that the residuary Article would apply and that the petition for enhancement of compensation would have to be filed within three years from the date of intimation of compensation fixed by the Board. Except that this is an authority for the position that the word "application" under Art. 137 would include petitions, original or otherwise, under the special laws and that it does not confine to applications contemplated by or under the CPC alone but would apply to any petition or application filed under any Act to a civil Court, this decision could not be relied on in support of the contention that Art. 137 is applicable to the company petitions under Ss. 397 and 398 of the Act.

12. In *Hungerford Investment Trust Ltd., Re*'s case ILR 1972 Cal. 286, the learned Chief Justice of that Court sitting alone, while dealing with a number of petitions including one under Ss. 397 and 398 of the Act made the following observations in paragraph 82 of the judgment:--

As at present advised, I would hold that Art 137 of the New Limitation Act, 1963, applies to an application under S. 397 or 398 of the Companies Act. I would, therefore, hold that events that happened prior to November, 28, 1964 will be barred by the application of Art. 137 of the Limitation Act of 1963, being more than three years before the date of the filing of this petition on November, 28, 1967, but others are within the limitation.

The main contentions so far as the petition under Ss. 397 and 398 of the Act in that case were as set out in paragraphs 50 and 52 of that judgment and they related to events which were outside the grounds that could be brought under S 397 and events that happened after the filing of the petition. A whole reading of the judgment shows not only this observation relating to limitation was unnecessary and it is in the nature of obiter. In fact, the petition was filed by a liquidator and issue No. 9 in the case was,

Whether the respondent Nos. 2 to 10 or any of them is responsible for not taking any action for recovering the amounts of Rs. 5,05,354 and Rs. 1,14,342 as alleged in paras 89 (i) and 89 (ii) of the petition? If so, what is the effect of such action?". It is with reference to this issue really the point of limitation could have been considered, S. 402 of the Act dealing with the powers of the Court on an

application under S. 397 or 398 confers powers on the Court to "set aside any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under S. 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference". With reference to this provision, the learned Judge has impliedly not accepted the applicability of Art. 137 but held that the limitation under S. 402 (f), of, the Act would apply. This stray observation on the applicability of Art. 137, therefore, could not be considered as an authority for the position that Art. 137 would apply. It may be pointed out that in the Guide to the Companies Act by Ramayya, Tenth Edition, 1984, edited by Justice Shah, former Chief Justice of the Supreme Court, the correctness of this decision on the question of applicability of Art. 137 is doubted.

13. In the above Calcutta case, in paragraph 66, the learned Chief Justice has referred to the expression "affairs of the company are being conducted" appearing in both Ss. 397 and 398 of the Act and observed that that shows a kind of continuing wrong. The expression "are being conducted" was also held as indicating hat construction. That was also the ratio of the decision of the Supreme Court in Shanti Prasad Jain's 35 Company Cases 351 case, referred to above. If that is so, a fresh period of limitation would begin to run at every moment of the time during which the breach or wrong continues as provided under S. 22 of the Limitation Act and since the existence of the continuous wrong is the sine quo-non for the maintainability, no question of limitation also could arise. Therefore, with great respect to the learned Chief Justice of the Calcutta High Court, having regard to the nature of the provisions of the Act, as held by the Supreme Court in Shanti Prasad Jain's 35 Company cases 351 case, cited supra, we are unable to share his view that Art. 137 would apply to a petition under Ss. 397 and 398 of the Act.

14. Apart from this legal position, on facts it would appear that even if there was any legal resolution as contended by the respondents, the petitioner was not aware of the same till about August, 1982, In paragraph 25 of the petition the petitioner has specifically stated thus:

The so-called minutes of the Meeting Alleged to be held on 30th July, 1978 was never communicated to the petitioner in spite of" specific requisition made by the petitioner's counsel and only from the paper book filed by the respondent's counsel in or about August, 1982, he saw the alleged minutes.

It may also be mentioned that the appellant was only a shareholder and not a Director and unless the resolution was communicated to him, there was no way of knowing and he cannot also be imputed with any knowledge of the same. In fact, there is no dispute that the resolution was not communicated to the petitioner. The learned Judge imputed knowledge of P.W. 1, one of the Directors of the Company to the petitioner on the ground that he is now one among the group which has filed the petition and who are aggrieved. We should also keep in

mind that it is for the respondents to prove with proper evidence, the petitioner's knowledge of the resolution. In the face of the allegations which have not been considered by the learned Judge on merits that there was no legally valid resolution, that the alleged resolution was a fraud committed on the company and other members it is not possible to dispose of the petition also summarily on the ground that it is barred by limitation.

15. For the foregoing reasons we are unable to agree with the learned Judge that the petition is barred by limitation.

16. On the third point, the learned Judge held that the petition is not maintainable under Ss. 397 and 398 of the Act. This was solely on the ground that the company is being managed by P.W. 1 as the Managing Director by virtue of an order of injunction granted in Company Application Nos. 1627 and 1670 of 1978 in Company Petition No. 48 of 1978 and that he continues to hold that office notwithstanding the five-years term contracted for, in the meeting of the Board of Directors held on 29th October, 1977 and that in the circumstances, it is difficult to hold that there has been any material change in the management or control of the company. With great respect to the learned Judge we are unable to share this view. In paragraph 32 of the petition the petitioner has specifically referred to the attempt of the respondents to gain control in the Board of Directors by appointing two of their own men as Directors in a clandestine and illegal manner and the attempt of the respondents to gain control over the ownership of the shares by allotting the same to themselves and their own kith and kin contrary to law. The further allegation is that creating such alterations in the Board and control over the ownership of the shares are with a view to conducting the affairs of the company in a manner prejudicial to the public interest and in any event, prejudicial to the interest of the company and the petitioner's group within the meaning of S. 398 of the Act. Apart from alleging that such acts also undoubtedly amount to acts of oppression on the petitioner's group it is also alleged that the peaceful co-existence has been completely tampered with or destroyed and there is a sort of dilemma in the smooth running of the company because of the respondent's group claiming illegal rights in the said illegal resolution. The further allegation is that the rights of the petitioner's group to choose the form of management which they considered beneficial to the company, have been deprived of and were sought to be oppressed in a manner most shocking and by reason of such oppression the affairs of the Company are in imminent danger of being: conducted prejudicially to the interests of the company and the petitioner's group and the public interest so far as it involves the future of 235 employees and their families and the loss of revenue to the Government. These allegations had not been gone into fully by the learned Judge and merely on the view that P.W. 1 is the Managing Director of the company, and therefore there is no material change in the management or control of the company. If the resolutions which are challenged are to be given effect to, certainly, the control of the company would go to the respondents' group and there could also be a material change in the management. In the circumstances,

we are unable to share the view of the learned Judge that the application is not maintainable under S. 397 or 398 of the Act. Suffice to say that these allegations deserve to be gone into on merits with reference to the evidence and the petitions could not be disposed of summarily. For the foregoing reasons we allow the appeal, set aside the order of the learned Judge and remand the matter for fresh disposal on merits. No costs.