
(2010) 08 CAL CK 0115
In the Calcutta High Court

Case No : C.P. No. 37 of 2005, C.A. No. 298 of 2009, A.P.O.T. No's. 272 and 396 of 2009 and A.C.O. No. 111 of 2009

Arun Kumar Tantia

APPELLANT

Vs

Om Prakash Tantia and Others

RESPONDENT

Date of Decision : 31-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 152
Companies Act, 1956 — Section 10F, 397, 398

Citation : (2010) 4 CALLT 307 : (2010) 159 CompCas 328

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : S.N. Mookherjee, Ratnanko Banerjee, Mohit Gupta, Debamitra Adhikari and Siddiqui Parveen, for the Appellant; S.K. Kapur, Pratap Chatterjee, Ranjan Bachawat, Sanjay Gondia and Ravi Kapur for respondent Nos. 1, 2 and 3, for the Respondent

Judgement

I.P. Mukerji, J.—This is an appeal u/s 10F of the Companies Act, 1956. The order that is challenged is interlocutory. It was made on September 14, 2009. By that order the appointed auditors were removed. Two firms, M/s. K. K. Chapparia and Associates and S. K. Agarwal and Co., were appointed joint auditors in their place. On this little point, the appeal has been argued for several days.

2. The first point is regarding maintainability. It is said that no appeal u/s 10F is maintainable as no question of law arises from the said order.

3. This point has to be gone into before proceeding further with the appeal on the merits.

4. An appeal under the Indian Income Tax Act, 1922, went up to the Supreme Court. The language of the said Act was identical, to Section 10F, namely, that an appeal lay from "any question of law arising out of such order". When does a question of law arise from the order ? In that case, Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., the Supreme Court said the

following in paragraph 31 (page 611 of 42 ITR):

The result of the above discussion may thus be summed up:

- (1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.
- (2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.
- (3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.
- (4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order.

5. This order of the Company Law Board does not immediately fall into any one of the above four categories discussed in the above judgment of the Supreme Court. Even if, we take sub-paragraph (4) no question of law was raised before the Tribunal nor considered by it. The Tribunal gave its decision plainly on the facts.

6. Our Division Bench in the case of *Metal Press Works Ltd. v. Ram Pratap Kayan* reported in (72 CWN 594), added its own authority to the above proposition of law. It said that the decision of the Supreme Court should be confined to the Income Tax Act only. It added another test to those laid down by the Supreme Court in its above judgment. If a question of law was neither raised before the Tribunal nor considered by it in its order but, otherwise arose from the order of the Tribunal, that question of law could be taken for the first time in appeal. Therefore, the above dictum of the Supreme Court was expanded by the Division Bench of our court to the extent that a question of law can be raised for the first time in an appeal under the Companies Act, 1956. That decision of the Division Bench was followed by another Division Bench of our court in *Shaw Wallace and Co. Ltd. v. Union of India* [1998] 4 CLJ 299.

7. There is another judgment of the Supreme Court in *Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others*, which is closest to answering the question which is raised in this appeal. The dictum of the Supreme Court relevant to this appeal is to be found in paragraph 36 of the judgment which is as follows (page 184):

Section 10F refers to an appeal being filed on the question of law. Learned Counsel for the appellant argued that the High Court could not disturb the findings of fact arrived at by the Company Law Board. It was further argued that the High Court has recorded its own finding on certain issues which the High

Court could not go into and therefore the judgment of the High Court is liable to be set aside. We do not agree with the submission made by learned Counsel for appellants. It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. In the present case we have demonstrated that the judgment of the Company Law Board was given in a very cursory and cavalier manner. The Board has not gone into real issues which were germane for the decision of the controversy involved in the case. The High Court has rightly gone into the depth of the matter. As already stated the controversy in the case revolved around alleged allotment of additional shares in favour of Ramanujam and whether the allotment of additional shares was an act of oppression on his part. On the issue of oppression the finding of the Company Law Board was in favour of Prathapan, i.e., his impugned act was held to be an act of oppression. The said finding has been maintained by the High Court although it has given stronger reasons for the same.

8. This passage identifies perversity of the order as a circumstance when a question of law is said to arise from it, when no question of law is raised before the Tribunal nor answered by it. Therefore, to answer the question of maintainability the facts have to be gone into in some detail.

9. A family known as the Tantia family is engaged in business. It came to be divided into two groups, one headed by Arun Kumar Tantia (AKT group) and Om Prakash Tantia (OPT group). They entered into some kind of a family settlement on December 27, 2004, by which the assets and other properties of the families were divided amongst the two groups.

10. The OPT group filed petitions Nos. 36 and 37 of 2005 before the Company Law Board u/s 397/398 of the Companies Act, 1956.

11. To effect the division, it seems, an expert was required to value the assets, estimate the liabilities, prepare the accounts and divide the assets and other properties accordingly. It was also contemplated that if the properties could not be evenly divided, the one group getting more would compensate the other for the difference by paying them a sum of money.

12. This impugned order has been passed in an application filed by the OPT group being C. A. No. 298 of 2009 before the said Tribunal seeking appointment of independent statutory auditors. It was filed on June 18, 2009.

13. The dispute is with regard to statutory audit of the accounts of M/s. Besco for the accounting year October 1, 2005 to the "cut-off date" provided in the settlement which is March 31, 2006 and limited audit for expenses only for the period April 1, 2006 to June 10, 2006. It was said in that application that the audit for the period October 1, 2005 to March 31, 2006, was outstanding along with the said limited audit for the period April 1, 2006 to June 10, 2006.

14. It is very important to note the following paragraph in the petition filed by the OPT group before the Company Law Board:

(6) It is submitted that since the mandate of the auditors to carry out the joint audit was for the accounting years 2003-04 and 2004-05 and which audit has been completed it is necessary that appropriate orders be passed by the hon"ble Board appointing independent statutory auditors to carry out the audit of the accounts of M/s. Besco Ltd., for the period October 1, 2005 to March 31, 2006, as also limited audit of expenses for the period April 1, 2006 to June 10, 2006 and also appoint a new Special Officer to supervise the conduct of audit.

15. Therefore, the contention which is made before me on behalf of the respondents is that the only ground on which the application was made was that the period for which the audit was ordered by the earlier order of the Company Law Board had expired and that a fresh auditor be appointed for the period October 1, 2005, onwards.

16. However, I notice that in paragraph 7 of the application bias of the appointed auditors were also alleged or at least apprehended. Paragraph 7 is as follows:

7. It is submitted that the applicants O. P. Tania group have all along contended that M/s. Singhi & Co., the statutory auditors of the company will not act independently and fairly in carrying out the audit of Besco Ltd., in view of the close personal relationship of its senior partner Shri Pradeep K. Singhi with Shri A. K. Tania. It is also pertinent to state here that this hon"ble Board vide order dated May 30, 2005, had removed the said Singhi & Co., from being and acting as statutory auditors of the company. On the other hand, A. K. Tania group has insisted that statutory audit be conducted by Singhi & Co., and no other, which substantiates the applicants contention that A. K. Tania group does not wish that its accounts be audited by an independent agency for that same will expose the siphoning off and stripping of assets done by the A. K. Tania group.

17. Before proceeding further with this judgment, the order dated May 30, 2005, appointing the auditors has to be examined. It records that the order was being passed by consent of the parties. There is no dispute that the subject-matter of the audit was up to September 30, 2005. From time to time orders were passed by the said Tribunal for implementation of the audit.

18. As I have already said there was ground disclosed in the application before the said Tribunal in which the impugned order was passed, that the appointed auditors were biased.

19. It is very interesting to note that there is no finding at all with regard to this alleged bias.

20. Let us see the finding on which the impugned order has been passed.

...Considering the fact that the audit for the last two years was inordinately delayed due to the differences between the two earlier auditors, as I indicated

during the hearing, I have decided to appoint two different firms of chartered accountants to jointly carry out the audit for the period from October 1, 2005 to March 31, 2006.

21. That there was inter se difference between the two appointed auditors is nowhere found in the record. Now, if there was difference between the two auditors which has been observed by the Tribunal and one party is in favour of the same set of auditors and the other party is not in such favour the Tribunal contemplating discharge of the auditors on such ground, ought to have invited arguments on the point. Especially, when they were appointed by consent of parties. That the period for which audit was ordered was over, did not matter.

22. It has been argued on behalf of the respondents that the period for which audit was claimed in the application in question was subsequent to the period for which auditors were appointed. The term of the appointed auditors has expired. Therefore, the Tribunal was free to appoint anybody of its choice. On the other hand learned senior counsel for the appellant has argued before me that the audit undertaken was a continuous process. Even if the appointed auditors have been appointed for a period ending September 30, 2005, such auditors ought to have been allowed to continue for the rest of the period for the sake of continuity and expeditious completion of audit. Moreover, it is contended on behalf of the appellant that the order appointing the auditors was passed by consent and ought not to have been set aside.

23. Various authorities have been cited in support of the proposition that a consent order cannot be varied except by consent, namely, *M.A. Cunningham Sircar Vs. Fred Stephens*, ; *Lachiram Dagduram Marwadi Vs. Jana Yesu Mang*, ; *Khitipati Roy Vs. Dharani Mohan Mookerjee*, ; *Ashoke Kumar Daw and Another Vs. Gobinda Chandra Dev and Others*, and *Deepchand Mini Vs. Ticamchand Mini*,

24. In my opinion, as far as the proposition of law is concerned if an order is final and passed on consent it is like a consent decree. A consent decree cannot easily be varied. I am quite doubtful whether a consent decree can be varied by consent. Order 23 does not permit such an exercise. Only circumstances which vitiate consent like fraud or misrepresentation or undue influence can be a ground for setting aside a consent decree. Of course, mistakes which are rectifiable under Sections 151 and 152 of the Code of Civil Procedure, 1908, are excepted (see the Division Bench decision of our court in *Ashoke Kumar Daw and Another Vs. Gobinda Chandra Dev and Others*,). So is the case with final interlocutory orders, in my opinion. But I suppose an interim order passed by consent can be varied if there is a subsequent development which occasions variation of that interim order, by consent or without consent. Some sanctity has to be given to consent given by the parties and it receiving the imprimatur of the court.

25. But the respondent has a point here. It says that the life of the order had expired inasmuch as the audit for which the order was passed was for the period

expiring on September 30, 2005. This period was not covered by the consent order.

26. However, in varying an interim order already passed, the above circumstances like existence of disputes inter se between the auditors, the continuity in the auditing process, the familiarity of the existing auditors with the subject-matter of audit, the speed with which the audit can be completed with the existing auditors and any other factors which were relevant, ought to have been considered before ordering change of auditors.

27. Now, I come to the question of law. If the necessary materials which are required for formation of opinion are not considered while pronouncing a decision, that decision is invalid for inter alia perversity. That is the question of law which arises from the order of the Tribunal as held in the decision Metal Press Works Ltd. v. Ram Pratap Kayan reported in (72 CWN 594) and Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, .

28. I do not think there would be much use in merely setting aside the order of the Tribunal, because the parties as it appears from the attitude taken by them, in challenging this apparently innocuous order would not cooperate with one another to complete the audit. Further, the respondents' counsel has said that they had no objection if an independent auditor was appointed by the court.

29. Therefore, for effective disposal of this appeal the impugned order of the Tribunal dated September 14, 2009, is set aside. However, in the facts and circumstances of the case I appoint Mr. Monoranjan Sen, Empanelled Auditor of this Court, 8/3, Bhabani Dutta Lane, 1st Floor, Kolkata-73, as auditor to audit the accounts for the period October 1, 2005 to March 31, 2006 and also for a limited audit of expenses from April 1, 2006 to June 10, 2006. The auditor may fix his fees, according to the work done. The audit work should be completed expeditiously. Liberty to the parties to approach the Company Law Board for implementation of this order.

30. Appeal and application are allowed to the above extent.

31. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

32. Later : Stay of operation of this judgment and order is prayed for on behalf of the appellant. Such prayer is considered. I stay operation of the judgment and order for three weeks from date.