

(2003) 11 CAL CK 0001

In the Calcutta High Court

Case No : A.P.O. No's. 346 and 347 of 1996 in Company Petition No. 222 of 1991

Bhagabati Developers P. Ltd.

APPELLANT

Vs

Peerless General Finance and Investment Co. Ltd. and Others

RESPONDENT

Date of Decision : 24-11-2003

Acts Referred:

Companies Act, 1956 — Section 397, 398

Citation : (2005) 123 CompCas 296 : (2006) 65 SCL 55

Hon'ble Judges : Altamas Kabir, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Bimal Chatterjee, Dipak Shome, A. Sinha and Dhruba Ghosh, for the Appellant; Pranab Kr. Roy, Pranit Kr. Roy and A.N. Chunder for respondent No. 1, Bhaskar Gupta and Abhijit Chatterjee for respondent No. 2, P.C. Sen and R.R. Sen for respondent No. 4 and Sudipto Sarkar, for the Respondent

Final Decision : Dismissed

Judgement

Alok Kumar Basu, J.—In these two appeals preferred by the appellant, Bhagabati Developers Pvt. Ltd., under the leave granted by the hon"ble Supreme Court contained in its order dated April 26, 1996, challenging the judgment and order dated January 13, 1992, passed by a learned single judge of this court dismissing Company Petition No. being 222 of 1991 filed u/s 397/398 and other provisions of the Companies Act, 1956, we are called upon to resolve a long pending dispute between the present appellant and the respondents, the Peerless Company, its directors and some of the shareholders.

2. The chain of events leading to and culminating in passing of the court order dated April 26, 1996, by the hon"ble Supreme Court and filing of the present appeal may be briefly narrated in this way which would also help us to a great extent to appreciate the rival contentions raised in this appeal.

3. Sri Ajit Chatterjee and his brother, Sri Argha Kusum Chatterjee (to be referred as Chatterjee brothers hereinafter), claiming themselves to be members of

Peerless Company within the meaning of the Companies Act, 1956, filed a petition in this court on May 30, 1991, under S Sections 397 and 398 read with other relevant provisions of the Act alleging, inter alia, gross mismanagement in the affairs of Peerless Company by its directors and also alleging gross irregularities and illegality, particularly in issuance of 30,000 shares by its directors, with specific prayers for supersession of the board of directors of Peerless Company and all its subsidiaries and also for appointment of special officer/receiver to manage the affairs of the company and its subsidiaries as interim measure and also for final directions from the court for proper management of the company and its subsidiaries as contemplated in the relevant provisions of the Companies Act. As Chatterjee brothers were lacking necessary qualifications required for filing of such petition, they obtained consent of the present appellant and also of one Mr. R. L. Gaggar in order to proceed with the matter.

4. The respondent, Peerless Company and others, on receipt of the notice of the company petition, filed an application on June 8, 1991, before the learned company judge challenging the maintainability of the company petition and subsequently on July 22, 1991, the respondents also filed their objection against the main petition. The learned company judge proceeded to hear both the maintainability application as well as the main petition and after conclusion of hearing, the learned judge, by order dated January 13, 1992, was pleased to uphold the objections of the respondents regarding maintainability of the company petition holding the same as not maintainable in law.

5. Chatterjee brothers preferred Appeal No. 35 of 1992 and Appeal No. 40 of 1992, respectively, challenging the order of dismissal of the main company petition as well as challenging the order holding the same to be not maintainable. During the pendency of both the appeals before a Division Bench of this court, Ajit Chatterjee, one of the appellant/petitioners, on November 16, 1993, filed applications in the two pending appeals for dismissal of the appeals as well as company proceeding and on the same day leave was granted to Ajit Chatterjee to withdraw the company proceeding as well as appeals. A similar applications were filed by Argha Kusum Chatterjee on November 17, 1993 and similar leave was granted by the Division Bench on November 18, 1993.

6. The present appellant on December 22, 1993, filed two separate applications in the two appeals with the same prayers for condonation of delay in filing those petitions, recalling the order of dismissal of appeals and company proceedings, for transposing Chatterjee brothers as proforma respondents, in both the appeals and for bringing the present appellant on record as the sole appellant in both the appeals contending, inter alia, that without serving any notice upon it the order granting leave to Chatterjee brothers to withdraw the appeal as well as company proceeding was recorded and that apart, being vitally interested in the affairs of the company, the appellant being an aggrieved party was entitled to proceed with both the appeals and the company petition.

7. The Division Bench of this court after hearing the respective parties dismissed both the applications of the present appellant by an order dated February 2, 1995, holding, inter alia, that there was no statutory requirement of service of notice upon the appellant and when the original company petition became non est, there was no question of any transposition of the Chatterjee brothers or bringing of the appellant on record as the sole appellant because simultaneously leave was also granted for withdrawal of both the appeals by the Chatterjee brothers. The present appellant thereafter filed two separate special leave petitions before the hon"ble Supreme Court sometime in July, 1995 and the hon"ble Supreme Court by its order dated April 26, 1996, while disposing of the two appeals arising out of the special leave petitions granted liberty to the present appellant to file appeals both against the dismissal of the company petition and allowing of the interlocutory application by the trial judge of this court and following the directions of the hon"ble Supreme Court, the appellant has filed this appeal on May 24, 1996.

8. The appellant being represented by senior counsel Mr. Bimal Chatterjee and Mr. Dipak Shome and the respondents being represented by senior counsel Mr. Bhaskar Gupta, Mr. P. C. Sen, Mr. P. K. Roy and Mr. Sudipto Sarkar had the occasion to address this Bench for several days in support of their respective case and from the oral submissions made by learned counsel of the parties and also from the written note of arguments submitted by the parties it is available that both the sides confined their submissions on two issues, one regarding maintainability of the present appeal and, secondly, regarding maintainability of the original company petition filed by the Chatterjee brothers. It may be recorded in this context that after hearing submissions of the rival parties and on examination of the written note of arguments submitted by them, it appears to us that both the issues mentioned above cannot be separated from each other, rather both the issues appear to be interlinked and interwoven and hence, we propose to take up the issue regarding maintainability of the present appeal first, and, thereafter, we may pass on to the second issue regarding maintainability of the original company petition.

9. Mr. Bhaskar Gupta, on behalf of the contesting respondents, raised preliminary objection challenging the maintainability of the present appeal. Mr. Gupta submits that the present appellant was granted leave by the hon"ble Supreme Court to file this appeal to challenge the order of the learned single judge dated January 13, 1992, whereby the learned single judge dismissed the company petition filed by Chatterjee brothers holding it to be not maintainable in law, Mr. Gupta contends that the present appellant approached the hon"ble Supreme Court through SLP to challenge the legality and validity of the order of a Division Bench of this court dated February 2, 1995, whereby the said Division Bench was pleased to reject two applications of the appellant for recalling of the order dated November 16/18, 1993, respectively, and it is pertinent to mention that by those two orders, the Division Bench granted leave to the Chatterjee brothers to withdraw both the appeals preferred by them against the order of the learned

single judge dated January 13, 1992, as well as the original company petition filed u/s 397/398 of the Companies Act. Mr. Gupta submits that from a plain reading of the order of the hon'ble Supreme Court it is very much clear that the hon'ble court did not touch the order of the Division Bench of this court dated February 2, 1995, and naturally, the order of the Division Bench dated November 16 and 18, 1993, as well as the order of the Division Bench dated February 2, 1995, have become final and is beyond any further challenge.

10. Mr. Gupta contends that since the order of the earlier Division Bench of this court granting leave in favour of the Chatterjee brothers to withdraw the main company petition has become final, there is no question of allowing the present appellant to continue the present appeal because the main petition out of which the order of the learned single judge dated January 13, 1992, arose is non-existent and if that original company petition is nonexistent in the eye of law, there cannot be any question of preferring an appeal in connection with that non-existent company petition.

11. Mr. Gupta submits that the present appellant in fact has been trapped unaware because without being successful to get the order of the earlier Division Bench dated February 2, 1995, set aside and without being successful in getting the order dated November 16 and 18, 1993, recalled and set aside, the present appellant has indulged itself in a shadow fight in preferring this appeal which has no existence in the eye of law. Mr. Gupta further clarified in this context that if to consider the present appeal this Bench treats the original company petition as being alive and enters into the merits of the present appeal that will be a clear violation of the order of the earlier Division Bench of this court dated November 16 and 18, 1993, as well as of the order dated February 2, 1995 and it will establish an unhealthy judicial precedent in defiance of established judicial norms, decorum and decency.

12. Mr. Gupta submits that it may be urged from the side of the appellant that it was granted leave by the hon'ble Supreme Court to prefer an independent appeal challenging the order of the learned single judge dated January 13, 1992 and this order of the hon'ble court was based on a suggestion given from the Bar and the hon'ble Supreme Court at the suggestion of the learned senior counsel for the respondents further made it clear that no question on limitation or on locus standi can be raised if such appeal is filed by the appellant. Mr. Gupta submits that in view of noninterference of the hon'ble Supreme Court with the order of the earlier Division Bench, the occasion of raising any dispute on the point of limitation or locus standi would not perhaps arise only because there is no scope of preferring any appeal as the original application is no longer existing before any forum.

13. Mr. Gupta submits that the contention of the appellant that being consenting party to the original application, it has acquired an independent right to challenge the verdict of the learned single judge notwithstanding the earlier order passed by Division Bench of this court mainly on the ground that as

consenting party has the right to oppose the application of the Chatterjee brothers for withdrawal of the appeal as well as the company petition and since no notice of such application filed by the Chatterjee brothers was served, the principle of natural justice demands that notwithstanding withdrawal of such appeal and petition, the appellant being consenting party has the full right and interest to pursue the original company petition, more so, when admittedly without the appellant and its associate, R. L. Gaggar, the Chatterjee brothers had no legal entity in the matter of filing of the original petition. Mr. Gupta contends that these submissions of the appellant are probably based on total misconception of law and statutory provision. Mr. Gupta submits that under the provisions of Rule 88(2) of the Company Rules any petitioner can withdraw a company petition filed u/s 397/398 of the Act only with leave of the court and there is no statutory requirement of service of any notice on anybody.

14. Mr. Gupta submits that the plea of the appellant to pursue the company application as of independent right is perhaps derived from misinterpretation of the decision of the hon''ble Supreme Court, reported in Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, but, the ratio of the decision in Rajahmundry''s case cannot be of any help for the present appellant simply because in Rajahmundry''s case the original petitioner did not withdraw the petition but some consenting parties subsequent to filing of the original petition sought to withdraw and in that perspective the hon''ble court laid down the principle that if a company petition was properly presented at the initial stage, it would not become invalid or inoperative by subsequent withdrawal of any consenting party, Mr. Gupta submits that in the present case admittedly the original petition was filed by the Chatterjee brothers and the present appellant was one of the consenting parties and, hence, if the original petitioners withdraw from the scene, the consenting party cannot have any legal entity under the provisions of the Companies Act, to proceed with the original application even admitting the legal position that a proceeding u/s 397/398 of the Companies Act assumes the character of a representative litigation.

15. Mr. Gupta, on the question of maintainability, finally contends that although the hon''ble Supreme Court granted leave to the appellant to file appeals challenging the order of the learned single judge, at the same time, it kept all the questions open that would be raised by the respondents for consideration by the appropriate forum and in this context Mr. Gupta specifically puts emphasis on that portion of the order of the hon''ble Supreme Court where the hon''ble Supreme Court made it clear that it would be open to the respondents to contend that because of withdrawal of Chatterjee brothers the original petition has become non-maintainable. Mr. Gupta submits that following the verdict of the hon''ble court the respondents would not throw any challenge against the appeal on the question of limitation or locus standi, but, it would be open for the respondents to challenge the maintainability of the present appeal on any other ground as available both in fact and in law. Mr. Gupta contends that for the reasons mentioned in his submissions the present appeal is not at all

maintainable and on this ground alone the appeal should be dismissed with costs.

16. Mr. Bimal Chatterjee appearing for the appellant, while refuting the submissions of respondents on the question of maintainability of the appeal, submits that each of the contentions of the respondents challenging maintainability of the present appeal is misconceived and should be rejected outright. Mr. Chatterjee contends that to resolve the issue raised by the respondents on the point of maintainability of the present appeal, the order of the hon"ble Supreme Court dated April 26, 1996, should be properly gone through and analysed. Mr. Chatterjee contends that it is pertinent to mention that the hon"ble court did not turn down the appeals preferred by the Bhagawati Developers Pvt. Ltd. (to be mentioned hereinafter BDPL for convenience) rather the hon"ble court disposed of both the appeals by recording some observations in general and by granting leave to BDPL in particular to prefer the present appeal.

17. Mr. Chatterjee contends that the hon"ble court made it clear that the respondents would not raise any objection on the question of limitation and on the question of locus standi against the appeal to be filed by the BDPL in pursuance of the order of the hon"ble court. Mr. Chatterjee contends that as per order of the honourable court it shall be open for the respondents to contend at the time of hearing of the appeal that by virtue of the withdrawals of the Chatterjee brothers, the original application under Sections 397 and 398 is not maintainable in law and also to contend that the ground upon which the learned single judge of this court dismissed the main application is perfectly in order and justiciable. Mr. Chatterjee submits that so far as BDPL is concerned, the hon"ble court gave option to it to contend at the time of hearing of the appeal that inasmuch as the original petition has been properly instituted, the withdrawal of the Chatterjee brothers at a later point of time does not affect the validity of its continuance. BDPL was also given the option to contend that the dismissal of the appeals preferred by the Chatterjee brothers on the basis of their withdrawal shall not come in the way of the appellant raising such contentions as are open to them in law. Mr. Chatterjee submits that the hon"ble court observed in its order that "we ourselves do not express any opinion on any of these contentions or for that matter on any of the other contentions that may be raised in the said appeals" and thus, the hon"ble court kept all the questions open for consideration by the forum before which the appeal was to be presented.

18. Mr. Chatterjee submits, first of all, that from the above narration and analysis of the order of the hon"ble Supreme Court it is significant to note that it did not record that it would be open to the respondents to contend at the time of hearing of the appeal that by virtue of the withdrawal of the main application by the Chatterjee brothers, the appeal was not maintainable which is now being sought to be contended by the respondents and, hence, such contention should be rejected in limine.

19. Mr. Chatterjee submits that one of the grounds of attack of the respondents

regarding maintainability of the present appeal has been that the orders of the earlier Division Bench of this court dated November 16, 1993, and November 18, 1993 and that of February 2, 1995, still survived and in other words the order of the hon''ble Supreme Court does not have any effect on those orders is totally misconceived and contrary to the spirit of the order of the hon''ble Supreme Court. To substantiate this point Mr. Chatterjee has put forward the doctrine of merger with much force. Mr. Chatterjee contends that it is a trite law that the final order passed in a proceeding covers the field and binds the parties, Mr. Chatterjee relying on two decisions of the hon''ble Supreme Court reported in Kunhayammed and Others Vs. State of Kerala and Another, and Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, , submits that with the passing of the order of the hon''ble Supreme Court on April 26, 1996, the earlier orders of the Division Bench of this court dated November 16, 1993, November 18, 1993 and February 2, 1995, legally merged in the order of the hon''ble Supreme Court and, hence, in the eye of law, the orders dated November 16, 1993, November 18, 1993 and February 2, 1995, stood automatically quashed notwithstanding no such observation having been recorded in the order of the hon''ble Supreme Court dated April 26, 1996.

20. Mr. Chatterjee contends that even if this Bench is of the view that the principle of merger is not applicable to the present case as urged by the appellant, still, no challenge can be thrown against continuance of this appeal simply because BDPL acquired an independent right to file the present appeal under the leave granted by the hon''ble Supreme Court and this direction was recorded by the hon''ble court at the suggestion of the respondents. Mr. Chatterjee submits that the hon''ble Supreme Court made a clear distinction between withdrawal of the Chatterjee brothers and withdrawal of the company petition and by making such distinction the BDPL has been given the right and authority to pursue an independent appeal challenging the dismissal of the original company petition in spite of withdrawal of the Chatterjee brothers from the said proceeding. Mr. Chatterjee submits that the hon''ble Supreme Court thought it fit and proper to give BDPL liberty to file an independent appeal and, therefore, instead of allowing transposition of BDPL as the appellant in the appeals of the Chatterjee brothers, allowed the BDPL to file an independent appeal as suggested by the respondents and, hence, at this stage the respondents cannot be allowed to deviate from the stand they took before the hon''ble Supreme Court and to allow them to attack the maintainability of the present appeal.

21. Mr. Chatterjee contends that a proceeding u/s 397/398 of the Companies Act is a proceeding of representative character from its initiation and it is established principle of law supported by the decisions reported in Jalpaiguri Cinema Co. Ltd. and Another Vs. Promotha Nath Mukherjee and Others, ; Rai Mathura Prasad Vs. Hanuman Prasad Bhagat and Others, and L. Rm. K. Narayanan and another Vs. Pudhuthotam Estates Ltd. and others, that after initiation of a proceeding u/s 397/398 of the Companies Act if any of the parties wants to withdraw from the

proceeding it cannot be infructuous or invalid and any participating party interested in the affairs of the company is equally entitled to pursue the proceeding in spite of such withdrawal and the hon''ble Supreme Court by granting leave to BDPL to file an independent appeal to challenge the verdict of the learned single judge in fact lent support to this longstanding legal proposition and, hence, it does not lie in the mouth of the respondents that in view of the withdrawal by the Chatterjee brothers the present appeal is no longer maintainable.

22. Mr. Chatterjee next contends that a very significant portion of the order of the hon''ble Supreme Court has been totally ignored by the respondents while throwing their challenge against the maintainability of the present appeal and that relates to the question of limitation which the respondents conceded before the hon''ble Supreme Court. Mr. Chatterjee submits that it was agreed upon during hearing of the special leave petitions that the respondents would not raise any question either on the question of limitation or on the question of locus standi if appeal are filed pursuant to the direction of the hon''ble Supreme Court. Mr. Chatterjee submits that the true impact of this observation of the hon''ble Supreme Court in the matter of condonation of delay in preferring the appeal has got a far reaching legal consequence.

23. Mr. Chatterjee submits with reference to the decisions of the hon''ble Supreme Court reported in *Ramdoss Vs. K. Thangavelu*, and *Rajendra Nath Kar Vs. Gangadas and Others*, , that when a court condones the delay caused in filing a proceeding it does not extend the period of limitation prescribed by law for filing it, rather it treats the proceeding as if it is filed within limitation, which it has the power to do if sufficient cause is shown for not filing the proceeding within the prescribed period. Mr. Chatterjee submits that the sub-heading of Section 5 of the Limitation Act is somewhat misleading and following the decision of the larger Bench of the hon''ble Supreme Court as *Rajendra Nath Kar v. Gangadas* (supra), it may be reasonably argued that the date of filing of the present appeal should be taken as that of filing much before the purported withdrawal of the appeals and company petition by the Chatterjee brothers and, therefore, the order of the earlier Division Bench of this court dated November 16, 1993, and November 18, 1993, becomes almost irrelevant and that cannot have any impact on the filing of the present appeal and the submission of the respondents in this regard is without any merit at all.

24. Mr. Chatterjee finally submits that there is virtually no merit in the submissions of the respondents that BDPL gathered inspiration and encouragement in the matter of approaching the Division Bench of this court for recalling of its order dated February 2, 1995, from the ratio of the decision recorded in the case of *Rajahmundry* (supra). Mr. Chatterjee frankly conceded that the facts of *Rajahmundry*'s case are certainly distinguishable from the facts of the present case, but, the underlying principle of *Rajahmundry*'s case cannot be thrown away outright simply because in *Rajahmundry*'s case the hon''ble

Supreme Court upheld the legal proposition that a proceeding u/s 397/398 of the Companies Act assumes a representative character and adherence to the principle of such representative litigation as contained in the CPC is required to be made in the case of proceeding under the Companies Act and in that sense even if there is no statutory requirement of service of any notice before making any withdrawal by a party from a pending proceeding u/s 397/398 of the Companies Act, the principles of natural justice, equity and fair play demands that before granting leave to any such withdrawal, the party consenting to the filing of such company petition must have a reasonable opportunity either to oppose such withdrawal or to seek leave of the court granting such withdrawal to allow itself to continue with the proceeding.

25. Mr. Chatterjee contends that the hon''ble Supreme Court by its order on April 26, 1996, in fact reiterated this legal principle and, hence, without any elaborate discussion about the merits of the order of the earlier Division Bench dated February 2, 1995, the hon''ble Supreme Court conferred an independent right of appeal upon BDPL and in such background the objections raised by the present respondents challenging the maintainability of the appeal should be discarded and this court should be pleased to hold that equity, fair play and the principles of natural justice demands that BDPL should be permitted to proceed with the appeal and this Division Bench should dispose of the appeal on the merits without indulging itself in any flimsy technicalities which would be against all canons of fair play, more so, when affairs of a public company is at issue.

26. In the course of reply and while refuting the above contentions raised by Mr. Chatterjee on behalf of the appellant in support of maintainability of the appeal, Mr. Gupta has made the following submissions for consideration of this court :

27. Mr. Gupta submits that the doctrine of merger is indeed an age old legal proposition but in a decision of the hon''ble Supreme Court reported in State of Madras Vs. Madurai Mills Co., Ltd., and followed by another decision of the Supreme Court reported in Kunhayammed v. State of Kerala (supra), the hon''ble court held that the doctrine of merger is not a doctrine of rigid or universal application and it cannot be said that wherever there are two orders, one by the inferior authority and other by superior authority passed in an appeal or revision, there is fusion or merger of the two orders irrespective of the subject matter of the appeal or revision order. Mr. Gupta contends that from the trend of judicial decision, the undisputed legal proposition emerges that the doctrine of merger would apply only when the superior court makes a definite pronouncement on the merits of the order appealed against or at least on the merits of the issues arising out of the order appealed against which forms the subject matter of the appeal before the superior court. If the superior court passes an order without pronouncing on the validity of the orders appealed against and at the same time leaves all the questions open, there is no scope for the doctrine of merger to apply.

28. Mr. Gupta submits that following the legal precedent it can be emphatically

stated that the order of the hon''ble Supreme Court did not affect the verdict of the earlier Division Bench of this High Court dated February 2, 1995 and as a natural consequence the order of the earlier Division Bench dated November 16, 1993, and November 18, 1993, respectively, stood unaffected even after pronouncement of the order of the hon''ble Supreme Court.

29. Mr. Gupta next contends that the submission of the appellant that once delay is condoned in filing an appeal, the appeal must be deemed to have been filed within the original period of limitation is totally misconceived and is based on erroneous interpretation of the nature of powers exercised by a court u/s 5 of the Limitation Act since Section 5 of the Limitation Act clearly speaks of extension of the prescribed period in certain cases. Mr. Gupta contends that the appellant has intended to introduce a legal fiction while interpreting the scope and ambit of Section 5 of the Limitation Act but such legal fiction can be introduced only by the Legislature and before a court of law the statutory provision is to be accepted and interpreted in the way it has been provided in the statute and not otherwise, and, hence, the proposition of the appellant that the present appeal should be accepted being filed before withdrawal of the Chatterjee brothers, is without any basis.

30. Mr. Gupta finally contends that there is no dispute regarding the principle that a petition u/s 397/398 of the Companies Act is a representative proceeding, but, Rule 88 of the Companies (Court) Rules provides for withdrawal of such representative proceeding with leave of the court and, hence, no help or assistance can be derived from the CPC keeping in mind the special statutory provision of the Companies Rules. Mr. Gupta contends that it is very much clear from the order of the hon''ble Supreme Court that the hon''ble court recognised the withdrawal of Chatterjee brothers both from appeal and the company petition and, hence, the hon''ble Supreme Court without considering the prayer of BDPL for its transposition as appellant in the appeals filed by the Chatterjee brothers granted liberty to file independent appeal and at the same time the respondents were given full liberty to agitate over the maintainability of such appeals to be preferred by BDPL and the hon''ble court made it further clear that both sides would be at liberty to support their respective stand on the question of maintainability of the appeal and it would be open for the appellate forum to decide the issue keeping in mind the relevant statutory provisions of the Companies Act and the Companies (Court) Rules and also the legal proposition of Rajahmundry's case (Supra), Mr. Gupta, therefore, concludes that " there is no merit in the submissions of the appellant on the question of maintainability of the appeal and on that question alone the present appeal is liable to be dismissed.

31. We have recorded above the points raised by the rival parties on the 31 question of maintainability as available from the trend of oral submissions of respective senior counsel as well as from the written notes of arguments submitted by them. From the submissions of the respective parties one thing is very much clear that both the parties have relied on the verdict of the hon''ble

Supreme Court dated April 26, 1996 and interpreted the same in their own way to substantiate their respective cases. Naturally, in order to resolve this vital issue touching maintainability of the present appeal, we are also required to understand and appreciate the true impact of the order of the hon''ble court dated April 26, 1996, in its proper perspective keeping in view the points and counter-points raised before us at the time of hearing.

32. Before venturing into the task of unfolding the true impact of the order 32 of the hon''ble Supreme Court, it would be most profitable, in our considered view, to quote the entire order of the hon''ble Supreme Court and, thereafter, to proceed on analysing its actual effect on the question of maintainability as raised before us and before reproducing the order of the hon''ble Supreme Court, we would like to bring on record a few words regarding the order of the learned single judge dated January 13, 1992, as well as the order of the previous Division Bench of this court dated February 2, 1995, which was the subject matter of challenge in the two special leave petitions filed by the BDPL resulting in the order of the hon''ble Supreme Court dated April 26, 1996.

33. As we have recorded at the beginning, the Chatterjee brothers filed the original company petition with a prayer for supersession of the board of directors of the Peerless Company and all its subsidiaries, for appointment of receiver/special officer as an interim measure for taking over of the management from the board of directors and for necessary directions as contemplated in the Companies Act for proper management of the company after removing the board of directors. The Chatterjee brothers alleged in their said petition that the board of directors are working in a narrow sectarian interest overlooking the general interest and benefit of the shareholders and to substantiate their point they cited various instances like issuance of 30,000 shares, changing of accounting procedure and also for siphoning off of money of the company for the benefit of a particular group of directors-cum-shareholders.

34. The Peerless Company and its directors, Mr. S. K. Roy, and others challenged the company petition both on the merits as also on maintainability by filing affidavit-in-opposition and also by filing an interlocutory petition and the learned trial judge took up both the matters together for consideration. The learned trial judge ultimately dismissed the main petition holding it to be not maintainable and for that matter did not enter into the merits of the allegations of the Chatterjee brothers. While dismissing the main petition on the question of maintainability, the learned trial judge observed, inter alia, that one of the Chatterjee brothers, namely, Ajit Kr. Chatterjee could not be considered to be a member of the company within the meaning of the Companies Act, inasmuch as, being a non-resident Indian, he did not obtain necessary permission from the RBI in the matter of transferring of share of his mother in his favour which was in clear contravention of the relevant provisions of the Foreign Exchange Regulation Act. The learned trial judge further observed that the consent letter accompanying the original petition and given by BDPL, the present appellant and

that of R. L. Gaggar were both invalid and ineffective in the eye of law because the consent letter of BDPL was defective in the sense that no application of mind by the consenter was available and regarding R. L. Gaggar, Mr. Lodha, the chairman of BDPL had no legal authority to give consent on behalf of Mr. Gaggar and that apart subsequently R. L. Gaggar by filing an affidavit had withdrawn such consent. The learned trial judge finally concluded that the company petition was defective in the way it was presented as the Chatterjee brothers were lacking the necessary shareholding qualification in the matter of presenting such application as required u/s 399 of the Companies Act.

35. The Chatterjee brothers filed two separate appeals challenging the dismissal of the original petition as well as challenging the findings of the learned company judge on the question of maintainability respectively. It is pertinent to mention that BDPL, the present appellant being fully aware of the order of the learned company judge dated January 13, 1992, neither filed any independent appeal nor did it make any application for addition of party in those pending appeals, although, both the appeals had been pending for a long time for disposal and during the pendency of those appeals the Chatterjee brothers filed two separate applications seeking leave of the court under Rule 88(2) of the Companies (Court) Rules, 1959, to withdraw both the appeals as well as the original company petition. The Division Bench before whom the appeals were pending after hearing the respective parties granted leave for withdrawal and subsequently BDPL filed two applications for recalling of the order of the Division Bench dated November 16, 1993, and November 18, 1993, respectively.

36. BDPL in their applications prayed for condonation of delay, recalling of the order, transposition of the Chatterjee brothers in the category of pro-forma respondents and finally recording of the name of BDPL as sole appellant in both the appeals. On examination of the order of the Division Bench dated February 2, 1995, it is available that the Division Bench in its order had the occasion to examine the legality and validity of the order of the trial judge dated January 13, 1992 and expressed its specific observation upholding the findings of the learned trial judge on the question of maintainability of the original company petition. From the order of the Division Bench dated February 2, 1995, it is further available that the BDPL in support of its prayers had argued before the Division Bench that the order granting leave of withdrawal in favour of Chatterjee brothers was ex facie, illegal and invalid simply on the ground that no notice before granting such withdrawal was served on it as the company proceeding was representative in character and such notice was a sine qua non for granting such withdrawal. The BDPL in support of its right of recording its name as sole appellant in both the appeals sought to convince that following the principle laid down in Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, the Division Bench should consider its prayer because the court should consider the validity of a proceeding started u/s 397/398 of the Companies Act at the time when it was presented and should not be guided by any subsequent development.

37. From the order of the Division Bench dated February 2, 1995, it is very much clear that the Division Bench discussed in detail all the points raised by BDPL in support of its prayer and finally rejected all the points holding, inter alia, that there was no statutory requirement within the meaning of the Companies Act and the Companies (Court) Rules for service of any notice on the consenting shareholder before granting leave of withdrawal u/s 88(2) of the Companies (Court) Rules, 1959 and also the principle laid down in the case of Rajahmundry (supra); has no application in the case of the company petition filed by the Chatterjee brothers. It is pertinent to mention that almost similar points have been raised by the learned senior counsel of the appellant at the time of hearing of the present appeal.

38. BDPL being aggrieved by and dissatisfied with the order of the Division Bench dated February 2, 1995, ultimately approached the hon"ble Supreme Court by filing two special leave petitions and the hon"ble Supreme Court while disposing of the two appeals arising out of those special leave petitions recorded the order dated April 26, 1996, which is now being reproduced in its entirety herein below :

"Leave granted. Heard counsel for the parties."

39. These two appeals are preferred against the judgment of the Division "Bench of the Calcutta High Court.

40. Ajit Kr. Chatterjee and another (hereinafter referred to as Chatterjee) proposed to institute an application u/s 397/398 of the Companies Act against the management of Peerless General Finance and Investment Company Ltd. Since the Chatterjee brothers did not hold 1.0 per cent, of the shares so as to enable them to file such an application, they obtained the consent of the appellant herein (Bhagabati Developers Pvt. Ltd.) and filed the application. In that application the Chatterjee brothers also filed an interlocutory application for direction. The Peerless Co. appeared and filed an application contending that inasmuch as the petitioner did not satisfy the requirements of 10 per cent, shareholding, the application filed by him was not maintainable in law and must be dismissed. The learned single judge of the Calcutta High Court upheld the contention of Peerless Co. and dismissed the application u/s 397/398, which also meant dismissal of interlocutory application.

41. Against the order of the learned single judge, two special appeals were filed by the Chatterjee brothers. Pending those appeals, it appears, there was a settlement between the Chatterjee brothers and the persons in control of Peerless, as a result of which the Chatterjee brothers withdrew their appeals. This was done without notice to the appellant herein. The Division Bench dismissed the appeal as withdrawn. When the appellant came to know of the said dismissal, it approached the Division Bench of the High Court seeking permission to continue the special appeals. The appellant's contention was that inasmuch as the appeals were withdrawn and dismissed without notice to it (who was a consenting party and whose shareholding alone enabled the original petition to

be filed, they are entitled to continue the appeals). This plea was rejected by the Division Bench against which the present appeals are preferred.

42. When these appeals came up for hearing, Sri K. K. Venugopal, learned senior advocate for the respondents submitted that the proper course for the appellants was to prefer an appeal against the judgment of the learned single judge dated January 13, 1992 (dismissing the main applications u/s 397/398) and not to seek to continue the appeals preferred by the Chatterjee brothers. Learned counsel stated that if the appellant prefers such appeals in the High Court even now the respondents shall not raise any objection on the ground of limitation and that they would not also object on the ground that the consenting shareholder is not entitled to file an appeal or continue the proceeding. Learned counsel, however, made it clear that it would be open to the respondents to contend that the ground upon which the learned single judge has dismissed the main application is perfectly in order and justiciable. To this course learned counsel for the appellant has no objection. Accordingly, it is directed that the appellant shall file appeals against the order of the learned single judge dated January 13, 1992, within four weeks from today. If so filed the appeals shall not be dismissed on the ground of limitation or on the ground that the appellant has no locus standi to file the said appeals. Of course, it shall be open for the respondents to contend in the said appeals that by virtue of the withdrawal of the "Chatterjee brothers", the original application u/s 397/398 is not maintainable in law. It shall equally be open to the appellant to contend that inasmuch as the original petition has been properly instituted, the withdrawal of the Chatterjee brothers at a later point of time does not affect the validity of its continuance. We make it clear that we ourselves did not express any opinion on any of these contentions or for that matter on any of the other contentions that may be raised in the said appeals.

43. It is made clear that the liberty given to the appellant to file appeal is not only against the order dismissing the main petition (section 397/398) but also the interlocutory application. It is further made clear that dismissal of the appeals preferred by the Chatterjee brothers on the basis of their withdrawal shall not come in the way of the appellant raising such contentions as are open to them in law.

"The appeals are disposed of in the above terms.

No costs."

44. From the above order of the hon''ble Supreme Court it is crystal clear that the hon''ble Supreme Court had the occasion to examine the order of the learned single judge dated January 13, 1992 and also the several orders of the earlier Division Bench of this court dated November 16, 1993, November 18, 1993, as well as the order dated February 2, 1995, which was the subject matter of challenge before the hon''ble Supreme Court. From the order of the hon''ble Supreme Court it is equally clear that the hon''ble court recognised the withdrawal of Chatterjee brothers both from the appeals as well as from the

company petition. From the order of the hon''ble Supreme Court it is also clear that the hon''ble Supreme Court did neither set aside the order of the earlier Division Bench dated February 2, 1995, nor modify the same. The hon''ble Supreme Court also did neither allow the prayer of BDPL for transposition of the Chatterjee brothers in the category of proforma respondents in the appeals nor did allow the prayer of BDPL for recording its name as sole appellant in those appeals. From a plain reading of the order of the hon''ble Supreme Court there are reasons to hold that the hon''ble court neither interfered with the order of the Division Bench dated February 2, 1995, nor recorded any observation touching the validity and legality of that order of the Division Bench.

45. It is clear from the order of the hon''ble Supreme Court that BDPL was granted leave to file two separate appeals, one against the order of the learned trial judge dated January 13, 1992 and another against dismissal of the interlocutory application preferred by the Chatterjee brothers seeking certain interim directions pending final disposal of the original company application, although, the BDPL opted to file a single appeal challenging the order of the learned trial judge dismissing the original application on the ground of maintainability.

46. From the order of the hon''ble Supreme Court it reasonably appears that the leave granted in favour of the BDPL in the matter of filing of appeals was not unconditional rather the hon''ble Supreme Court in its directions contained in the order under reference set out a given canvas within which BDPL could argue its points regarding continuance of the appeal and at the same time the respondent Peerless, was given options to oppose the continuance of the said appeal, if filed. In other words, the hon''ble court fixed certain parameters for both the sides in the matter of continuance of the appeal, if preferred at all by the BDPL and ultimately left the matter totally open for consideration by the appellate forum after hearing the contentions of both the sides within the given parameters on fixed by the hon''ble Supreme Court while making their respective submissions regarding continuance of the appeal.

47. It would be quite relevant for us now to set out what are the parameters of the respective parties within which they could argue their respective case in the matter of continuance of the appeal as per direction of the hon''ble Supreme Court. So far as the respondents are concerned, the hon''ble court made it clear that it shall be open for the respondents to argue before the appellate forum that by virtue of the withdrawal of the Chatterjee brothers, the original application u/s 397/398 is not maintainable in law. The hon''ble court also made it clear for the respondents to argue that the ground upon which the learned single judge has dismissed the main application is perfectly in order and justiciable. So far as the appellant is concerned the hon''ble court directed that it shall equally be open to the appellant to contend that inasmuch as the original petition has been properly instituted, the withdrawal of the Chatterjee brothers at a later point of time does not affect the validity of its continuance. It was further made clear by the

hon''ble court for the appellant to argue that dismissal of the appeals preferred by the Chatterjee brothers on the basis of their withdrawals shall not come in the way of the appellant raising such contentions as are open to them in law.

48. From the trend of arguments put forward by the respective parties and also from their written notes submitted before us, we are inclined to hold that both the parties have in fact strictly adhered to the directions of the hon''ble court in the matter of forwarding their points in the continuance of the present appeal inasmuch as the respondents have urged in detail touching the maintainability of the appeal in the manner as indicated by the hon''ble court and similarly, the appellant has also put forward its point in support of continuance of the appeal in the manner as indicated by the hon''ble court contending, inter alia, that withdrawal of the Chatterjee brothers from the appeal as well as from the company petition cannot affect their independent right to pursue with the present appeal and also to pursue the main company petition.

49. But, the million dollar question which really requires a positive and unambiguous answer in order to resolve the question raised over maintainability of the appeal is what would be the real impact of the order of the hon''ble Supreme Court upon the orders of the Division Bench of this court dated November 16, 1993, November 18, 1993 and February 2, 1995.

50. In the above context, we intend to make it clear that we are not at all convinced by the argument of Mr. Chatterjee on the question of doctrine of merger which he has sought to establish with the help of different decisions of the Supreme Court indicated earlier. After hearing the submissions of the respective parties on this particular issue of merger, we are of clear view that the doctrine of merger cannot have any application in the present case because of the fact that the order of the hon''ble Supreme Court dated April 26, 1996, neither set aside the order of the Division Bench dated February 2, 1995, nor did it modify the same in any manner, rather, by its order the hon''ble Supreme Court without touching the order of February 2, 1995, prescribed another alternative for the BDPL in the form of preferring an independent appeal, at the same time, giving option to the respondents to oppose that appeal on all the available grounds as permissible in law. Thus, in our considered view the hon''ble Supreme Court duly recognised the withdrawal of the Chatterjee brothers from both the appeals and the company proceeding and thereby it can be reasonably concluded that the hon''ble Supreme Court did not want to interfere with the order of the Division Bench dated November 16 and 18, 1993, and also the order dated February 2, 1995, and, hence, the doctrine of merger propounded by Mr. Chatterjee cannot be accepted even on its face value.

51. Mr. Chatterjee in order to substantiate his point that the order of the Division Bench dated November 16, 1993, November 18, 1993, was without any relevance and importance so far as the continuance of the present appeal is concerned sought to argue that by condoning the delay in the matter of presenting the appeal in question, the hon''ble Supreme Court in fact enabled

BDPL to urge that it had actually filed the appeal before the Chatterjee brothers filed their petition seeking withdrawal from the appeals and the company petition. At this juncture we intend to bring it on record that we very much admire and appreciate the innovative argument of Mr. Chatterjee in his attempt to establish his point regarding interpretation of the provision of Section 5 of the Limitation Act, though we have no hesitation to record at the same breath that on proper examination of the point at issue after hearing both the sides we are unable to subscribe to the views expressed by Mr. Chatterjee in the matter of his interpretation of the provisions of Section 5 of the Limitation Act.

52. On a plain and simple reading of the provisions of Section 5 of the Limitation Act, we gather the reasonable impression that by exercising power given by the statute u/s 5 of the Limitation Act the court of law extends the period of limitation and by no stretch of imagination, it can be argued that the statutory provision indicates any "anti-clock-wise" movement as contended by Mr. Chatterjee and such a movement as proposed by Mr. Chatterjee would be against the very principle of statutory provision and nobody would deny that the court of law would accept the statutory provision as it stands unless there are compelling circumstances to deviate from the same. Thus, the second line of argument of Mr. Chatterjee supporting the maintainability of the present appeal does not appear to be acceptable to us for the reasons indicated above.

53. It has been the constant endeavour of BDPL to establish its case that even without the Chatterjee brothers it is in a position to proceed with the original company petition and also to challenge the findings of the learned trial judge dated January 13, 1992. BDPL made almost the self-same submissions before the previous Division Bench while placing its petition for recalling of the order dated November 16 and 18, 1993, respectively, and the self-same submissions were made before the hon"ble Supreme Court as it is very much evident from the text of the order of the hon"ble court as reproduced in our judgment. It is significant to note that the Division Bench while recording its order dated February 2, 1995, discussed in detail the stand taken by BDPL to substantiate its claim and to continue with the company petition even without Chatterjee brothers and also to continue the appeals without them. The main argument of BDPL has been that the Chatterjee brothers had no requisite share qualification in the matter of presenting the company petition and only BDPL and its associates lent the necessary support as contemplated u/s 399 of the Companies Act, 1956, and the company proceeding being a representative proceeding when such proceeding was instituted with the help of BDPL and its associates, BDPL and its associates has necessary legal entitlement to continue with the proceeding even if the Chatterjee brothers opted to withdraw from the scene for their own cause. To substantiate this point BDPL very much relied on the principle of law laid down in the case of Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, Another line of argument of the BDPL before the Division Bench was that the leave of withdrawal granted in favour of the Chatterjee brothers was without any legal basis for non-service of notice. It

is pertinent to mention that the Division Bench lent its full support behind the findings of the learned single judge dismissing the original company petition on the ground of maintainability.

54. Now, the crucial question comes for consideration that when it is an established fact as evident from the reading of the order of the hon"ble Supreme Court that there was no existence of the original company petition since withdrawal of the Chatterjee brothers can there be any existence of any appeal arising out of the said company petition and in our considered view the only answer to this crucial question must be in the negative. Further reference has been made by the contesting parties to the ratio of decision laid down by the hon"ble Supreme Court in the case of Rajahmundry Electricity Supply Corporation Ltd."s case (supra) and from the order of the hon"ble Supreme Court we also get that the appellant was given the liberty to argue on this point that notwithstanding withdrawal by the Chatterjee brothers the appellant can proceed with the company proceedings provided it can be shown that the said proceeding was properly presented at the initial stage and at the same time the respondents were also given the liberty to argue that in view of the withdrawal of the Chatterjee brothers the company proceedings cannot be continued and it is significant to note in this context the observation of the previous Division Bench where it went on recording that "if a horse is alive the rider could be changed but there cannot be any change of rider in respect of a dead horse". The basic difference between the ratio in the Rajahmundry"s case and this case is that in the Rajahmundry"s case the company petition continued to be in existence even after withdrawal of some of the supporting members, whereas in the present case, the company petition itself has been permitted to be withdrawn and is no longer existing. Taken the main body is gone, an appendage ceased to exist independently.

55. Another significant observation of the previous Division Bench was that if the company petition was found valid and legally effective at the time of presentation, notwithstanding withdrawal by the Chatterjee brothers, the question of continuance of the same by the present appellant could have been considered in a favourable way, but, that is not the case in the present appeals. According to the observation of the learned single judge the company petition was invalid and ineffective at the time of its institution, because, one of the Chatterjee brothers was not a "member" within the meaning of the Companies Act and at the same time one of the consenting parties, namely, R. L. Gaggar, had withdrawn his consent soon after filing of the original application and on both these counts, even if the Chatterjee brothers had not withdrawn, the company petition could not be accepted as a valid petition in the eye of law and we have already recorded that these findings of the learned single judge were upheld by the Division Bench while disposing of the petitions filed by BDPL and even taking the risk of repetition it can be stated that the hon"ble Supreme Court did not interfere with the findings of the Division Bench in this regard while recording its order dated April 26, 1996.

56. Thus, after considering the oral submissions of learned counsel of both the sides and the written notes of arguments submitted by them and on proper examination of the order of the hon"ble Supreme Court dated April 26, 1996, we are of the view that the order of the previous Division Bench dated November 16 and 18, 1993 and February 2, 1995, were not touched by the hon"ble Supreme Court regarding recognition of the withdrawal of Chatterjee brothers both from the appeals as well as from the original company petition and in that background the present appellant being a consenting party, and that consent too not being above legal scrutiny, has no legal right to proceed with the present appeals without the original application out of which the appeals arose and which is non-existent in the eye of law.

57. Thus, for the reasons recorded hereinabove, we are of the view that the present appeals are not maintainable and on this ground alone the present appeals are liable to be dismissed and there is no requirement in the eye of law to enter into the other aspect of the matter touching maintainability of the original company petition.

58. Accordingly, both Appeals Nos. 346 and 347 of 1996 are dismissed. However, considering the facts and circumstances, there will be no order as to costs. Pending applications; if any, also stand dismissed.

59. All parties to act on a signed copy of the operative portion of the judgment on usual undertakings.

60. Certified copy of this judgment if applied for, may be supplied as expeditiously as possible after complying with all necessary formalities.

Altamas Kabir J.

61. I agree.