
(2014) 01 KAR CK 0185
In the Karnataka High Court
Case No : Company Appeal No. 15 of 2012

Bhupinder Rai and Another	Vs	APPELLANT
S.M. Kannappa Automobiles P. Ltd. and Others		RESPONDENT

Date of Decision : 18-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17
Companies Act, 1956 — Section 111, 111A, 397, 398, 399

Citation : (2014) 121 CLA 538 : (2014) 183 CompCas 207

Hon'ble Judges : Dilip B. Bhosale, J;B. Manohar, J

Bench : Division Bench

Advocate : S.S. Naganand, Senior Advocate and S. Sriranga, Advocate for the Appellant; Poonam Patil for Prabhuling K. Navadgi for Respondent No. 6, Arun Srikumar for Respondents Nos. 7 to 9, V. Srinivasa Raghavan for Indus Law for Respondent No. 1, B.U. Sundeep Kumar for Rajesh and Rajesh for Respondent No. 5 and Pramod Nair for Respondents Nos. 2 and 4, Advocate for the Respondent

Judgement

Dilip B. Bhosale, J.—Heard learned counsel for the parties. By consent, taken up for final disposal at the stage of admission. This company appeal is directed against the order dated October 17, 2012 ((2013) 113 CLA 114), passed by the Company Law Board, Chennai Bench, at Chennai in Company Application No. 25 of 2012 in Co. P. No. 4 of 1991, filed by the appellant for amendment of pleadings.

2. It would be necessary to state the background facts against which the appellant had filed Company Application No. 25 of 2012 under regulations 17 and 44 of the Company Law Board Regulations, 1991 read with Order 6, rule 17 of the Code of Civil Procedure, 1908, seeking amendment of the pleadings.

3. The appellants had filed Company Appeal No. 5 of 2005, in this court, against the order dated October 24, 1994, passed by the Company Law Board, in Company Petition No. 4/111/SRB of 1991 ((1996) 86 CompCas 18) (for short

"company petition").

4. The company petition was filed by the appellants seeking declaration that the purported allotment of 6,000 shares in favour of respondents Nos. 5 and 6, i.e., respondents Nos. 6 and 7 in the company petition, (for short "the respondent") at the meeting of the board allegedly held on September 24, 1990, is void, illegal and inoperative. The appellants further prayed for direction to rectify the register of members of the company by deleting names of the respondents therefrom in respect of 3,000 shares each allotted to them.

5. The company petition was however rejected by the Company Law Board, upholding the impugned allotment of 6,000 shares. It appears that the appellants raised the question whether allottees of the share had paid any monies as consideration for allotment of shares. As against this, the respondents claimed that they had advanced certain loans to the company and in lieu thereof 6,000 shares were allotted to them. In other words, it was contended that the amount of loans was converted into equity shares. The appellants as well as the respondents filed affidavits of Sri K.M. Lokanath dated July 31, 2002 and of Sri Vijay Kumar Narang dated August 12, 2002. From the pleadings and the contention urged on behalf of the parties and also the aforesaid affidavits and rejoinder it was noticed that the issues raised therein being disputed questions of fact and further it was not clear from the order of the Company Law Board as to what material was available before the Company Law Board while deciding the company petition and so also in view of the subsequent developments, the parties had agreed for setting aside the order dated October 24, 1994, passed by the Company Law Board in the company petition and accordingly they filed "minutes of order" dated February 27, 2012, in Company Appeal No. 5 of 2005. By way of the minutes of order, after stating background facts and so also the reasons for setting aside the order dated October 24, 1994, the matter was remanded with direction to hear it (company petition) de novo. Operative portion of the minutes of order reads thus:

The order dated October 24, 1994, passed in Company Petition No. 4/111/SRB/1991 by the Company Law Board, Chennai, is hereby set aside.

The case is remanded to the Company Law Board to restore the said company petition to its file and adjudicate the matter de novo taking into consideration the affidavit dated July 31, 2002, filed by Sri K.M. Lokanath, the affidavit in reply dated August 12, 2002, of Sri Vijay Kumar Narang, the rejoinder of Sri Lokanath dated September 21, 2002 and any further pleadings and documents which the parties may choose to file. The parties are directed to appear before the Company Law Board on March 14, 2012, at 2.30 p.m.

The registry is directed to transmit the aforesaid three pleadings referred to above to the Company Law Board, Chennai, forthwith by speed post. The respondents are directed to produce the originals of the attachments to the affidavit of Sri Lokanath before the Company Law Board on the date fixed for

appearance of parties. The Company Law Board shall permit the parties to file additional pleadings and documents, if any, and decide the matter de novo within a period of 6 months from the date of receipt of a copy of this order, without being influenced by any observation made in the course of this order. In the event the chairman finds that the Additional Special Bench, Chennai is not able to dispose of the matter within the time stipulated, the Chairman of the Company Law Board is requested to either hear it or it is open to the Chairman to allocate the case to any other appropriate Bench for disposal.

If the respondents apply for return of original documents and records once produced, the Company Law Board shall consider the request after hearing both parties.

Sri Bhupinder Rai shall be entitled to be present as an observer at every board meeting of the company till the Company Law Board decides the matter afresh. The company is directed to give due notice along with agenda papers to Sri Bhupinder Rai and shall also send a certified copy of the minutes of every board meeting of the company from this day till the Company Law Board passes a final order. Sri Bhupinder Rai shall not be entitled to be present when the Board discusses any issue in relation to submission of tenders by the company or receive agenda papers relating thereto.

(emphasis Here printed in italics supplied)

6. From a bare perusal of the order and in particular, the operative portion thereof, it is clear that this court remanded the case to the Company Law Board, restoring the company petition to its file and directed to adjudicate the matter de novo taking into consideration the affidavit dated July 31, 2002, filed by Sri K.M. Lokanath, affidavit in reply dated August 12, 2002, of Sri Vijay Kumar Narang, the rejoinder of Sri Lokanath dated September 21, 2002, and "any further pleading and documents which the parties may choose to file". The Company Law Board was also directed to permit the parties to file additional pleadings and documents, if any, and decide the matter de novo within a period of six months from the date of receipt of the order. In view of this order, it appears that the appellants filed application in C.A. No. 25 of 2012 in the company petition seeking amendment of pleadings. Except respondent No. 5 all other respondents contested the said application which the Company Law Board decided by its order dated October 17, 2012, impugned in the present appeal.

7. The Company Law Board rejected the application filed by the appellants seeking amendment of the pleading on the grounds that the proposed amendment is beyond the scope of the order of remand dated February 29, 2012, i.e., the order in terms of the minutes, that the amendment changes the nature of the case of the appellants made out in the company petition and that the prayer introduced by way of amendment is barred by limitation.

8. We have perused the order passed by the Company Law Board and it appears to us, apart from the grounds mentioned above, the Company Law Board

dismissed Company Application No. 25 of 2012 filed by the appellants on the ground that by way of an amendment the appellants sought to convert their original application u/s 111 of the Companies Act, 1956 (for short "the Act") into one under sections 397 and 398 of the Act.

9. Mr. Naganand, learned senior counsel appearing for the appellants assailed the order of the Company Law Board mainly on the ground that it was not open to the Company Law Board to reject the application for amendment of the pleadings in view of the order passed by this court in terms of the minutes. He submitted that the Company Law Board proceeded on the assumption that the order in terms of minutes was a consent order obtained by the parties and held that it cannot be modified by way of seeking amendment of the pleadings. Mr. Naganand submitted that the proposed amendment would not change the nature or character of the original company petition whereby, improper allotment of shares was challenged. He further submitted that a composite petition u/s 111 and sections 397 and 398 is maintainable. In support of this contention, he placed reliance upon the judgment of the Delhi High Court in Charanjit Khanna and Others Vs. Khanna Paper Mills Ltd. and Others, and so also, the order of the Supreme Court dated August 8, 2011, whereby the said judgment of the Delhi High Court was confirmed. He then submitted that the amendment sought by the appellants is necessary for determining the real question in controversy between the parties, viz., illegal/improper allotment of 6,000 shares and hence, the Company Law Board ought to have allowed the amendment as sought. He submitted, in any case, the amendment sought would not cause any prejudice to the respondents apart from the fact that the amendment would be necessary to determine the real question in controversy. He then submitted that the Company Law Board committed grave error of law in entering into the correctness or falsity of the contents of the amendment. He submitted that it was not open to the Company Law Board to consider merits of the amendment sought to be incorporated at the stage of allowing the prayer for amendment. He submitted that the Company Law Board overlooked the order of this court, which was not a consent order, which allowed the parties to amend the pleadings and produce the documents in support thereof. In other words, he submitted that in fact it was not necessary for the appellants to file separate application for seeking amendment of the pleading since the parties were permitted to amend the pleadings by the order in terms of the minutes.

10. On the other hand, learned counsel for the respondents at the outset submitted that it is not open to this court to examine any order of the Company Law Board unless it suffers from any legal infirmity. It was submitted that the Company Law Board rightly rejected the application for amendment on the ground of limitation and also on the ground that the amendment changes the nature of relief sought in the original application. It was pointed out that the company petition was filed in 1991 and while doing so, in paragraph 12 thereof, the appellants made a positive statement that "separate action being initiated by the petitioner indicating the respondents Nos. 2 to 7 have been misappropriating

the funds of the company and have been siphoning off the funds of the company", and in view thereof, it was not open to the appellants to amend the pleadings and seek conversion of their original application u/s 111 into one under sections 397 and 398 of the Act, having chosen not to initiate separate action as aforesaid. In other words, it was submitted that having chosen not to initiate separate action against the respondents for more than 21 years, for the reliefs contemplated under sections 397 and 398 of the Act it was not open for the appellants to seek amendment of the pleadings and introduce reliefs under these provisions. The amendment sought by the appellants, it was submitted, not only travels beyond the scope of the order of remand but it changes the very nature and character of the original application filed u/s 111. By way of amendment the appellants have virtually introduced a new case and having considered the same, the Company Law Board has rightly rejected their application for amendment. In support of these contentions, learned counsel appearing for the respondents, placed reliance upon the judgments of the Supreme Court in *Londhe Prakash Bhagwan Vs. Dattatraya Eknath Mane and Others*, , *K. Raheja Constructions Ltd. Vs. Alliance Ministries and others*, and *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Others*, , the judgment of the Calcutta High Court in *Hungerford Investment Trust Ltd., Re (in Voluntary Liquidation) Vs. Turner Morrison and Co. Ltd.*, . It was also submitted that if the amendment is allowed, it shall enhance the scope of enquiry contemplated u/s 111 of the Act, which is summary in nature. The enquiry, he submitted, u/s 397 of the Act is wider, and hence the amendment cannot be allowed. Lastly, he submitted that after having relinquished a part of the claim, i.e., the reliefs under sections 397 and 398 of the Act, it was not open to the appellants to seek such relief by way of amendment after more than 21 years. In support of this contention, he placed reliance upon the provisions contained in Order 2, rule 2 of the Code of Civil Procedure, 1908 and the judgment of the Supreme Court in *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Others*, .

11. Mr. Naganand, learned senior counsel appearing for the appellants in re-joinder, in so far as the ground of limitation is concerned, submitted that in view of the subsequent developments namely, the judgment of this court in *M/s. S.M. Kannappa Automobiles Pvt. Ltd. No. 2 New Mental Hospital Road Bangalore - 560027 Vs. Bhupinder Rai and Sudharshan Kumar Manchanda*, , it became inevitable for the appellants to seek amendment of the pleadings and relief under sections 397 and 398 of the Act. He also invited our attention to the order of the Supreme Court dated July 9, 2012, whereby the judgment of this court in the aforesaid case between the very parties has been confirmed. He further submitted that the delay in making the application for amendment cannot be a ground for rejecting the amendment application. In support of this contention he placed reliance upon the judgment of *Sampath Kumar Vs. Ayyakannu and Another*, .

12. At the outset, we find merit in the submission advanced by Sri Naganand,

learned senior counsel appearing for the appellants that the application seeking amendment was in fact not necessary in view of the order in terms of the minutes whereby the parties were permitted to file additional pleadings. He submitted that the application for amendment was filed only to complete the formality for bringing further pleadings on record. It is clear from the order in terms of the minutes that after setting aside the impugned order dated October 24, 1994, the case was remanded to the Company Law Board with a direction to adjudicate the matter "de novo" taking into consideration the affidavits, as aforementioned, and "permitting the parties to file additional pleadings and documents, if any". It was not necessary either for the Company Law Board to hear the parties on the question of amendment of the pleadings or for the respondents to contest the application for amendment. The Company Law Board could have allowed the amendment and considered its merits in the course of hearing of the company petition. Instead of adopting this course, the Company Law Board, it appears, heard the company application for amendment at length and passed order running into about 52 pages.

13. We have gone through the relevant portion of the order with the assistance of learned counsel for the parties and it appears to us that the Company Law Board has entered into merits of the amendment sought to be incorporated. The Supreme Court, on several occasions including in *Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others*, , has made it clear that while considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsify of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated are not to be adjudicated at the stage of allowing the prayer for amendment. This cardinal principle was not followed by the Company Law Board in the instant matter. Moreover, the Company Law Board proceeded on the assumption that order in terms of the minutes was a consent order and observed that the amendment sought was beyond the scope the order of remand.

14. We have perused the company petition, in particular, the grounds of challenge in paragraphs (1) to (18). We find that challenge to the allotment of 6,000 shares to the respondents was on the ground of mala fides and for collateral purpose, namely, to benefit the respondents at the cost of other shareholders. The appellants specifically contended that exercise of power by respondents Nos. 2 to 5 in the company petition for allotment of 6,000 shares is vitiated by fraud. In other words, they played fraud on the appellants allotting the shares behind their back, prejudicially affecting their rights. In short, it was contended that allotment of six thousand shares in favour of the respondents was not for the benefit of the company but it was for fraudulent and mala fide purpose of controlling the company. The allotment of share was also challenged on the ground that it was for an improper motive and against the interest of the company.

15. It is, in this backdrop, the matter, as aforementioned, had reached this court by way of Company Appeal No. 5 of 2005 and, as observed earlier, it was remanded for its de novo adjudication taking into consideration the affidavits and further pleadings and the documents which the parties may choose to file. By way of amendment, the appellants seek to add paragraphs XIX and XX as additional grounds after ground No. XVIII in the company petition and additional prayers as paragraphs 18 and 19. The additional grounds Nos. XIX and XX and additional prayers 18 and 19 sought to be introduced in the company petition read thus:

I Add the following additional grounds after ground No. XVIII

XIX. It is submitted that the purported allotment of 6,000 shares in favour of respondents Nos. 6 and 7, on the face of it, is for a collateral purpose. Neither was the allotment of additional shares bona fide, nor was it in the interest of the company, nor was a proper and legal procedure followed to make the allotment. The motive for the allotment was mala fide, the only motive being to gain control of the company. The hon"ble Supreme Court in the case of Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, , in similar circumstances, held that the entire allotment of shares was oppressive and was liable to be set aside. In Pearson Education Inc. (formerly Prentice Hall Inc.) Vs. Prentice Hall India (P) Ltd. and Others, , the hon"ble Delhi High Court has held that even one such act would be sufficient to constitute oppression and mismanagement if it disturbs the equity stakes decisively by bringing down the equity share of the petitioners. The said decisions are squarely applicable to the facts of the present case. The allotment of 6,000 shares in favour of respondents Nos. 6 and 7 is wholly oppressive and is liable to be set aside u/s 397 of the Companies Act, 1956.

XX. The allotment of 6,000 shares in favour of respondents Nos. 6 and 7 is wholly oppressive to the petitioners. Having regard to the fact that the respondent is a small domestic company, a quasi-partnership having been formed from a partnership firm, it would be just and equitable to wind up respondent No. 1 company as there is complete breakdown of mutual good faith and trust on account of respondent No. 7's conduct. This has also been so found by the Division Bench of the hon"ble High Court in O.S.A. No. 46 of 2006 and connected cases disposed of on March 22, 2012 (M/s. S.M. Kannappa Automobiles Pvt. Ltd. No. 2 New Mental Hospital Road Bangalore - 560027 Vs. Bhupinder Rai and Sudharshan Kumar Manchanda,). Winding up would prejudice the petitioners and therefore alternate relief under sections 397 and 398 is warranted to protect the company and the interest of its members, the petitioners herein.

II. Add the following additional prayers

18. Declare that the purported allotment of 6,000 shares in favour of respondents Nos. 6 and 7 at the meeting of the board stated to have been held

on September 24, 1990, as prejudicial to the interests of the company and oppressive to the petitioners, and consequently set aside the said allotment.

19. Remove respondents Nos. 2, 5, 7 as directors of the company and disqualify them to hold office as directors of respondent No. 1 company.

16. From a bare perusal of the grounds sought to be introduced by the appellants, it is clear that the additional grounds do not travel beyond the purported allotment of 6,000 shares. By way of amendment, it was contended that the entire allotment of shares was oppressive. Thereby, in other words, the appellants have endeavored to introduce a legal ground to challenge the said allotment contending that the entire allotment of shares was oppressive and hence liable to be set aside. We do not find a whisper sought to be introduced by way of amendment about the alleged misappropriation or siphoning off of the funds of the company, as stated in paragraph 12 of the original petition. In this paragraph, the appellants made a statement that they would initiate separate action against the respondents. By way of amendment, we do not find any attempt on the part of the appellants to seek any action against the respondents for the alleged misappropriation or siphoning off of the funds of the company. It is true that by way of amendment they have added the prayer/relief under sections 397 and 398 of the Act but that by itself cannot be a ground for rejecting the application. By way of an amendment, the appellants have not deviated from original challenge to the improper allotment of 6,000 shares. Moreover, there is no legal bar in filing a composite petition before the Company Law Board under sections 111, 397 and 398 of the Act. In this connection, the judgment of the Delhi High Court in Charanjit Khanna and Others Vs. Khanna Paper Mills Ltd. and Others, , is relevant, wherein the concept of composite petition was considered while allowing the amendment of the company petition under sections 397 and 398 of the Act. The relevant observations read thus (page 319):

Having heard the parties, I am of the view that the present appeal is not an appeal on facts but it gives rise to a question of law, namely, whether a composite petition under sections 397 and/or 398 read with section 111A of the Act is maintainable.

In my opinion, it cannot be said as a proposition of law that no composite petition under sections 397, 398 and 111A of the Act is ever maintainable. In fact, in a large number of petitions filed under sections 397 and/or 398 of the Act, the primary allegation of oppression and mismanagement is that the faction that it is in control of the company has either intentionally reduced the rival faction to less than one-tenth of the total number of members of the company or removed the rival faction from the register of members. In such cases where allegation of oppression and mismanagement is inextricably intertwined with the issue of maintainability of the petition u/s 399 of the Act, a composite petition has to be held as maintainable. To ask a petitioner to file two separate petitions in such circumstances would not only be unfair but would also result in

unnecessary delay.

17. The judgment of the Delhi High Court, as observed earlier was confirmed by the Supreme Court.

18. We are satisfied that the amendment would not change the basic nature and character of the company petition and/or that it does not travel beyond the scope of the order of remand. In our opinion, it does not change the nature of the case except the fact that by way of amendment the appellants seek additional relief under sections 397 and 398 of the Act. In fact, this court had allowed/permitted to amend the pleadings. That apart, the Company Law Board wrongly proceeded on the assumption that the order in terms of the minutes of the order was a consent order. The Supreme Court in *Speed Ways Picture Pvt. Ltd. and Another Vs. Union of India (UOI) and Another*, , has made it clear that the order in terms of minutes of order is not the consent order or is not an order in terms of consent and that it is an order in invitum.

19. Learned counsel appearing for the respondents relied upon the judgment of the Supreme Court in *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Others*, in support of his contention that once having relinquished the right to file separate proceedings for the reliefs under sections 397 and 398 of the Act, as stated in the company petition, the appellants cannot be allowed to introduce by way of an amendment after more than 21 years. This submission, in our opinion, deserves to be rejected outright in view of the peculiar facts and circumstances of the cases as aforementioned. In the present case, relinquishment of relief would be at the most to initiate separate action for misappropriation or siphoning off of the funds of the company and not in respect of the relief under sections 397 and 398 for improper allotment of 6,000 shares. Similarly, the judgment of the Supreme Court in *Londhe Prakash Bhagwan Vs. Dattatraya Eknath Mane and Others*, , on the point of limitation is also of no avail to the respondents to contend that the amendment sought is barred by limitation for the reasons stated in the foregoing paragraphs. In fact the Supreme Court, in *Sampath Kumar Vs. Ayyakannu and Another*, has observed that mere delay in seeking amendment of the pleadings cannot be a ground for refusing the prayer for amendment. The judgment of the Calcutta High Court in *Hungerford Investment Trust Ltd., Re (in Voluntary Liquidation) Vs. Turner Morrison and Co. Ltd.*, , also is of no avail to the respondents to challenge the amendment. As a matter of fact, a challenge to the amendment on the ground of limitation need not be considered at this stage inasmuch as the ground of limitation can be raised at any stage of the proceedings. Even the question whether the amendment would relate back to the date of the petition or it would operate from the date of amendment also need not be considered at this stage and can be gone into at appropriate stage of the proceedings. This court would not like to express any opinion on these questions. Therefore, we are not making any further observation on the point of limitation apart from the observations made in the forgoing paragraphs.

20. The basic ground of challenge that there is no legal infirmity in the order of the Company Law Board also deserves to be rejected outright on the ground that the Company Law Board overlooked the mandate of the order passed in terms of minutes of the order. The order in terms of the minutes is an order in invitum which is binding on both parties which agreed before this court for allowing/permitting the parties to file further pleadings and documents as they may choose. In the circumstances, the order dated October 17, 2012 ((2013) 113 CLA 114) passed by the Company Law Board in C.A. No. 25 of 2012 in C.P. No. 4 of 1991 is set aside. C.A. No. 25 of 2012 is allowed. The appellants are directed to carry out amendment within two weeks from the date of receipt of this order. It is open to the respondents to file written statement/reply if they so desire within six weeks from today. Once the amendment is carried out, it is open to the appellants to move the Company Law Board for hearing of the company petition.

21. At this stage, Mr. Naganand, learned senior counsel for the appellants submits that the Member of the Company Law Board sitting at Chennai has already refused himself from hearing of the company petition and in view thereof the company petition has already been sent to the Chairman for placing it before the appropriate Bench of the Company Law Board. This court is informed that so far the Chairman had not assigned the case to any other Bench. The Chairman of the Company Law Board is therefore requested to assign Company Petition No. 4 of 1991 to appropriate Bench of the Company Law Board or hear this petition himself and dispose of it as expeditiously as possible, and preferably, within a period of six months from the date of receipt of this order or from the date of assignment to any other Bench within a period of four weeks from today.

22. If the company petition is assigned to any other Bench, we hope and trust that the said Bench shall hear and decide the company petition as expeditiously as possible and preferably within a period of six months from the date of reference. Parties through their counsel are directed to appear before the Chairman or before the appropriate Bench of the Company Law Board, as the case may be, on February 24, 2014.