
(2011) 08 CAL CK 0180
In the Calcutta High Court

Case No : ACO No. 82 of 2011, APOT No. 318 of 2011 and CP No. 1 of 2010

Birla Corporation Ltd.

APPELLANT

Vs

Birla Education Trust and Others

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 14
Companies Act, 1956 — Section 10F, 235, 237, 247, 250

Citation : (2011) 166 CompCas 647 : (2011) 4 CompLJ 334 : (2011) 109 SCL 420

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Anindya Kumar Mitra and Pratap Chatterjee, Malay Kumar Ghosh, Manju Bhuteria, Paritosh Sinha, Debangsu Basak and Sachchida Nand Pandey in ACO No. 82, Kalyan Kumar, Bandopadhyay, Ranjan Bachawat, S. Roy Chowdhury and Rajesh Upadhyay, in ACO No. 83, for the Appellant; S.K. Kapur, Bimal Chatterjee, S. Sarkar and S.N. Mookherjee Sr. Advs., P.S. Sengupta, Jishnu Saha, M. Bhattacharyya, Ravi Kapur, Sooriya Ganguli, Pooja Chakrabarti and A. Mehta for Respondent No. 1 to 6, P.C. Sen, Sanjiv Kr. Trivedi, Debanjan Mandal, Sandip Dasgupta, Soumya Ray Chowdhury, Sourya Sadhan Bose, Deepnath Roy Chowdhury, Satadeep Bhattacharyya and Sirsanya Bandopadhyay Advs. for Respondent No. 7, Abhrajit Mitra, Sudeshna Bagchi, Jishnu Chowdhury, Sarvapriya Mukherjee and Debasri Dutta for Respondent Nos. 16 to 40, for the Respondent

Judgement

Niruddha Bose, J.—In these two appeals, under challenge is an order of the Company Law Board, Principal Bench dated 11 July 2011. This order was passed in an interlocutory proceeding registered as C.A. No. 332 of 2011 arising out of a company petition, being C.P. No. 01 of 2010. Another application, registered as C.A. No. 338 of 2011, taken out by the Birla Corporation Limited and the Appellants in ACO No. 82 of 2011 (the company), seeking dismissal of the said interlocutory application was also considered in the said order and direction for affidavits has been given in that application. The company petition was filed by the Respondent No. 1 to 6 representing more than 10% shareholders of the

company alleging mismanagement and oppression in the Respondent company. This petition was filed under the provisions of Sections 235, 237, 247, 250, 397, 398 and 402 of the Companies Act.

Earlier, two other orders were passed by the Company Law Board (CLB) in different interlocutory proceedings arising out of the same company petition on 9 February 2011 and 17 June 2011 and these two orders are also under challenge before this Court in two different appeals. In the application registered as C.A. No 332 of 2011, the applicants (Respondent Nos. 1 to 6 in these two appeals) have raised grievances on different counts over running of the said company by the existing management. So far as the impugned order is concerned, the controversy relates to donation of significant sums of money to Madhav Prasad Priyamvada Birla Apex Charitable Trust, who are the Appellants before me in ACO No 83 of 2011. Allegations of the applicants in the main company petition is that one Harsh Vardhan Lodha (HVL), who is the Chairman of the Board of Directors of the said Company is seeking to control the promoter groups' share in the said company without the authority of law. In C.A. No. 332 of 2011, the complain of the applicants is that HVL and his family/associates control the said trust and such donations in substance constitute siphoning of funds of the company to the HVL controlled trust. One of the prayers of the applicants in C.A. 332 of 2011 is to prevent further flow of funds to the said trust. Altogether, a sum of rupees 23.5 crores approximately has been donated to the trust by the company.

2. In the order appealed against, it has been held;-

Considering the Respondents' reply arguments so far to the allegations in this C.A., looking at the Directors' Reports of the R-1 Company for the years 2006-2007 to 2009-2010 which do not mention that the funds are for setting up of a hospital or for what purpose, looking at an undated project report which mentions the date as 25th January 2010 (written in hand) without disclosing as to who prepared the Report, for whom and when, at whose's instance and what the project really is, the Applicants have succeeded in making out a prima facie case that the project Report is a sham, and is an afterthought, no details are forthcoming from the Respondents in this regard, in the facts and circumstances of this case, the Applicants having succeeded in making out a prima facie case of continuing of mismanagement and oppression by siphoning off of R-1's funds to an apparently a moribund Trust since 2001, a trust the main trustee of which happens to be the Chairman of the R-1 Company and another trustee being his wife and the third trustee being nobody else but his alter ego, in the facts and circumstances of this case the R-1 Company is hereby required to produce three certified copies of each document/detail/records as mentioned from (a) to (e) in para 28 of this Company Application at pages 16 & 17 to the Bench officer of the Principal Bench (Shri Saud Ahmad) in a sealed cover on or before 20th July 2011. On receipt of the documents, the Bench officer shall forward one copy each to the Auditors of the R-1 Company as well as to Ernst and young, already appointed in this matter in CA 302/11, 5 for giving their detailed comments

within four weeks and placing the same before the Principal Bench before hearing and disposing of CP No. 1/2010 on merits. Looking at the details and the manner of payments of huge amounts from the A/Cs of the R-1 company as given specifically in paras 24, 25, 35, the Bench officer is also required to issue Notice alongwith a copy of this order to the trust and its trustees to furnish their justification of receipts of such huge amounts enclosing documents to support their case, if any, on or before 20th July 2011 to the CLB and to all the parties in this matter failing which the Applicants' prayer of their impleadment in this matter shall stand allowed.

Adjourned to 30.09.2011 at 2.30 P.M. for arguments on C.P. No. 1/2010 and C As therein.

3. The impugned order has been challenged both on procedural grounds and on merit. In ACO No. 83, the Appellants are Madhav Prasad Priyamvada Birla Apex Charitable Trust (the trust) and in ACO No. 82 of 2011, the Appellants are the company. So far as assailing the judgment on procedural ground is concerned, it has been submitted on behalf of both the Appellants that the impugned order was passed before effective conclusion of hearing at the ad interim stage. It is their contention that the interlocutory application 332 of 2011 was heard on 7 July 2011 and hearing was adjourned till 11 July 2011. On that date i.e. 11 July 2011, learned Counsel for the company had not completed the submissions and the company also had filed a fresh application for dismissal of C.A. No. 332 of 2011, which was registered as C.A. No. 338 of 2011. Prayer was made for adjournment of hearing on that date on behalf of the trust on the ground of personal bereavement of their learned Senior Counsel. The hearing of the proceedings on that date went on till recess. The Bench did not sit after recess and no indication was given as regards the next date on which the order would be passed. The Advocates-on-record of the Appellants were intimated on the next date over the telephone that an interim order had been passed. It is this interim order which is under challenge before me. As regards the manner in which the proceeding was conducted on those two days, it has been pleaded in the stay petition of the trust in ACO No 83 of 2011;-

24. Upon receiving notice for mentioning on 7th July, 2011, the Petitioners instructed Mr. Ashish Dholakia, Advocate to appear in the matter and Vakalatnama, in favour of Mr. Dholakia, Advocate was executed in his favour. Senior Advocate practicing in this Hon'ble Court was also engaged to appear on behalf of the Trust before the Company Law Board. Conference was also held with the Senior Advocate on the evening of 9th July, 2011.

25. Unfortunately, on 10th July, 2011, the Ld. Senior Advocate's mother breathed her last while he was travelling to New Delhi from Kolkata. Upon receiving such information, he immediately rushed back to Kolkata from New Delhi Airport itself.

26. The Petitioners thereafter requested Mr. Ashish Dholakia, Advocate to seek

adjournment on their behalf before the Company Law Board on 11th July 2011.

27. On 11th July, 2011, Mr. Dholakia circulated a letter and prayed for adjournment of the matter. A copy of the said letter dated 11th July, 2011 is annexed hereto and marked with the letter "F".

28. When the matter was called on for hearing, Mr. Dholakia, Advocate sought an adjournment of the hearing of the matter. Mr. Dholakia had also handed over the adjournment letter circulated by him to the Bench Officer of the Company Law Board. On the said prayer for adjournment being made, the Senior Counsel appearing on behalf of the Respondent Nos. 1 to 6, Mr. Bimal Chatterjee submitted that no relief would be sought against the Petitioners on 11th July, 2011 and therefore there should be no impediment to the hearing being continued.

29. In view of such submission, the Company Law Board directed the adjournment notice circulated by Mr. Dholakia to be kept on record. The Company Law Board thereafter proceeded to hear Counsel appearing for the Respondent No. 7. The hearing continued till 1.00 p.m. At 1.00 p.m., the Company Law Board observed that it would not be possible to continue the hearing of the matter after recess and further dates of hearing of C.A. No. 332 of 2011 and an application filed by the Respondent No. 7 for its dismissal would be fixed afterwards.

30. No submission was made by Counsel appearing on behalf of the Respondent Nos. 1 to 6 concerning the Petitioners herein. No prayer was also made against or concerning the Petitioners. In fact the Counsel on behalf of the Respondent Nos. 1 to 6 did not make any submission and whatever submissions were made on behalf of the Respondent No. 7.

4. The main complaint of the company on merit is that the same issues were examined by the CLB earlier in its order dated 9 February 2011 and prima facie finding of the CLB was that the company petition itself was motivated and prayer for interim relief was declined in the earlier proceeding. In this perspective, the Appellants' case is that the CLB ought not to have passed this order on grounds akin to the principles of *res judicata*. On merit, it has been contended that there was no irregularity committed by the company in making donation. Such donation was given for legitimate reason, being construction of a hospital.

5. The grievance of the trust is that they did not get adequate opportunity to represent their case and the impugned order ought not to have been passed before impleading them as a party Respondent.

6. Further submission on behalf of the trust is that the learned member of the bench ought not to have marked the matter heard-in-part on the first day of hearing itself and this was a fit case for adjournment of hearing having regard to the ground on which such adjournment was prayed for on that date. The impugned order, according to the Appellants ought to be quashed on the ground

of violation of the principles of natural justice. It has also been contended that no order could have been passed against the trust who were not parties to the proceeding, and the CLB ought not to have interfered with the affairs of the trust in any event while deciding an application for oppression and mismanagement of the company.

7. On the point of granting adjournment, on behalf of the trust a judgment of the Supreme Court in the case of Bashir Ahmed Vs. Mehmood Hussain Shah, has been referred to. In this judgment it has been held while dealing with the issue of granting adjournment on the ground of difficulty of the Counsel:

6. Therefore, the court is enjoined to satisfy itself in that behalf. If the party engages another counsel as indicated therein, then the need for further adjournment would be obviated. The words "in time" would indicate that at least reasonable time may be given when a counsel suddenly becomes unwell. There would be reasonable time for the parties to make alternative arrangement, when sufficient time intervenes between the last date of adjournment and the next date of trial. In such a case, adjournment on the ground of counsel's ill health could be refused and the party would bear the responsibility for his failure to make alternative arrangements. Take for instance, a suit was adjourned for trial for a period of one week and the counsel appears to have suddenly become indisposed which would be known to the party. Therefore, the party, in advance, has to make alternative arrangement to proceed with the trial engaging another counsel. The words "in time" would, therefore, indicate that reasonable time would be required for making alternative arrangements.

It is the case of the Appellant trust that, having regard to the reason for which adjournment was sought for, the CLB should have granted adjournment instead of passing the interim order in the light of the ratio of this judgment.

8. The case of the trust is that all the remittance to the trust was for legitimate purpose and the trustees had taken steps to set up a hospital. The investment made by the trust were to make the properties of the trust tax efficient. Affairs of the trust, according to the Appellants, cannot be the subject matter of a proceeding under Sections 397, 398 or Section 402 of the Act since there was no arrangement or agreement between the company and the trust and it was a simple case of donation to a charity. Referring to the provisions of Section 402 of the Act it was argued that payment made more than 3 months before filing of the company petition No. 1 of 2010 could not form subject-matter of proceeding before the CLB. My attention was drawn to Section 10E(5) of the Act and it was argued that the jurisdiction to pass interim order under the aforesaid provision can be exercised only after hearing the parties and Regulation 24 of the CLB Regulation does not empower the CLB to pass order at the interim stage against a body who are not parties to the proceeding.

9. The main argument on behalf of Respondent No. 1 to 6, being the applicants who initiated the said "mismanagement and oppression" proceeding is that the

trust is a mere conduit to siphon funds out of the company and transmit them to a trust which was under the control of the persons against whom charge of mismanagement and oppression has been brought, their primary target being HVL, who is one of the trustees. It has been contended that there is no bar under the Companies Act to pass an order at the interim stage under Regulation 24. The plea of res-judicata has been contested by the applicants on the ground that the principle of res-judicata is applicable only when an issue is finally determined and not against an order passed at the interim stage. On the jurisdiction of the Company Law Board to pass an interim order the decisions of the Supreme Court in the cases of M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, , Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, and a judgment of this Court in the case of Girdhar Gopal Dalmia and Others Vs. Belgachi Tea Co. Ltd. and New Terai Association Ltd., have been relied upon.

10. It has been urged before me on behalf of the applicants (i.e. Respondent Nos. 1 to 6 in both the appeals) that the appeal should be dismissed on the ground that there is no question of law involved in these appeals. The company has been directed to file certain documents only and the trust has been asked to justify the receipt of such funds. The jurisdiction to pass such order requiring production of documents according to the applicants flows from regulation 24 of the CLB regulation read with Section 10E(4C) of the Act and Order 11 Rule 14 of the Code of Civil Procedure. Further case of the applicants is that the issue of not granting adjournment of hearing scheduled on 11 July 2011 cannot be a question of law as it is purely within the discretion of the CLB to decide as to whether hearing of a matter shall be adjourned or not on a particular day. In any event, it has been argued by the learned Counsel appearing for the applicants that no prejudice has been caused to any of the parties by this order.

11. So far as the interim order of 11 July 2011 is concerned, argument was advanced before me at length both on merit as well on the procedural aspect. According to Appellants the manner in which the proceeding was conducted before the CLB was seriously flawed. On behalf of the company, the allegation of violation of the principles of natural justice was emphasised, while on behalf of the Appellant trust, the main allegation is that they were not given opportunity of hearing at all. The case of the company is that they were not allowed to conclude submissions and the hearing was abruptly stalled midway. If this was the case, then there was serious breach of principles of natural justice which would warrant quashing of the order impugned.

12. Though these two appeals were argued before me at length on their merit, I want to test first as to whether principles of natural justice was followed or not by the CLB while passing the interim order. On behalf of the applicants/ Respondents, it was argued that minor violations of the principles of natural justice would not warrant interference if no prejudice is caused to a party by an order passed in breach of such principles. Such proposition may apply in the field

of administrative law, but in my opinion deviation from this principle would not be permissible in a proceeding before a tribunal like the CLB, which is vested with the powers which was originally exercised by the Company Court. Proceeding before such tribunal is adversarial, and the tribunal is bound to hear the rival parties before it passes an order, except under extraordinary circumstances. In the present case, prima facie no such extraordinary circumstances was there warranting passing of an order ignoring the plea for adjournment of one of the parties on the ground of their inability to represent their case because of non-availability of learned Senior Counsel. The ground on which such adjournment was sought, being sad demise of the mother of the learned Senior Counsel, was wholly legitimate.

13. I have discussed in the earlier part of this order the reason as to why the learned Senior Counsel engaged by the trust could not attend the hearing on 11 July 2011. In my opinion, closing the argument midway without recording that hearing was being concluded on the question of issuing an ad interim order and not fixing a further date for order also reflects irregularity in conduct of the proceeding by the CLB. This irregularity, if established would also constitute denial of adequate opportunity of hearing to the company as also the trust.

14. But these allegations, excepting the fact that adjournment of hearing was sought for by the trust which has not been disputed in course of hearing by the learned Counsel for the applicants, are there before me only in the form of sworn statements by the authorized representatives of the aggrieved parties. No direction for affidavits was given in respect of the stay petitions, nor such direction was prayed for. Allegations are mostly against the CLB over the manner in which the proceeding was conducted before it. The CLB is not before me as a party, as in an appeal proceeding the Court or Tribunal whose order is under challenge before the appeal Court is never impleaded as a Respondent. The only testimony of its proceeding is the records of that proceeding. But these records 14 are not before me in full except copies of two orders dated 7 July 2011 and 11 July 2011. I have reproduced the order of 11 July 2011 in the earlier part of this order. The order of 7 July 2011, the copy of which has been produced before me reads:

CA No 332/2011 mentioned. Part heard. Adjourned to 11/7/11 at 11 a.m.

15. If these two orders form the entire recordal of proceedings of these two interlocutory applications, then in my prima facie opinion the order of the CLB would not be sustainable, having been passed in violation of the principles of natural justice. The impugned order would have to be set aside on this very ground alone. But I do not think I can come to a final conclusion on this point in the absence of the entire records of the proceeding being produced before me.

16. As I have observed earlier, argument was advanced before me on merits of these proceedings and these appeal were argued at length. But I am refraining from expressing any opinion on merit of these two appeals at this stage without

coming to a specific finding as to whether there was violation of the principles of natural justice or not in passing the interim order. I am of this view because if I find adequate opportunity of hearing was not given to the Appellants before passing the interim order, then the appropriate course would be to set aside the impugned order on this ground alone and remand the matter for fresh hearing to the CLB. The Appellate Court u/s 10F of the Companies Act, 1956 has limited jurisdiction to hear an appeal on points of law only. Thus, a party complaining that the CLB had passed an order without hearing them properly should be given the opportunity to represent their case before the CLB again, where they would be able to justify their stand on factual issues as well.

Moreover, if eventually the CLB is directed to rehear the matter particularly on the question of granting of interim order, then expression of any opinion on merit of the case by the Appellate Court would influence the outcome of the proceeding there.

17. It is for these reasons I have chosen not to address any of the issues raised before me on merit and confined my scrutiny of the order impugned solely on the question as to whether the Appellants had adequate opportunity of hearing before the CLB or not. On the basis of materials produced before me, I am prima facie of the view that they did not get adequate opportunity of hearing and for this reason I stay the operation of the impugned order passed on 11 July 2011. I have considered the issue of balance of convenience also, and I do not find an interim stay of the said order would cause any serious inconvenience or prejudice to the Respondents. Let the records of the CLB pertaining to C.A. No. 332 of 2011 and C.A. No. 338 of 2011 be produced before this Court on 23 August 2011. On that date the matter shall be listed under the heading For Orders at 2 p.m. The interim stay shall continue until 5 September 2011 or until further order, whichever is earlier.

18. The Registrar, Original Side of this Court is directed to take appropriate steps to ensure production of records.

19. All parties concerned are to act on a photostat signed copy of this order on the usual undertaking.