
(2013) 04 MAD CK 0298

In the Madras High Court

Case No : Company Appeal No's. 1 to 4 of 2012

Dallan Albaraka (Ireland) Limited

APPELLANT

Vs

Pentamedia Graphics Limited and Others

RESPONDENT

Date of Decision : 30-04-2013

Acts Referred:

Citation : (2014) 182 CompCas 521 : (2014) 2 CompLJ 341 : (2013) 8 MLJ 425

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : Aravind P. Datar, for S.R. Rajagopal, for the Appellant; A.S. Kailasam for A.S. Kailasam and Associates, P.H. Aravind Pandian, for Harishankar Mani and Satish Parasaran, for the Respondent

Judgement

K.B.K. Vasuki, J.—The appellant in all the four appeals is the applicant in the four applications, arising out of Company Petition No. 106 of 2010 on the file of Company Law Board, Chennai, which are rejected by the Company Law Board. Company Petition No. 106 of 2010 was filed under Sections 397, 399, 402, 403 and 406 of the Companies Act, by the first respondent/Pentamedia Graphics Limited against the respondents 2 to 6 Mayajaal Entertainment Limited and Others and the same was disposed of by the Company Law Board on 28.2.2011 in terms of the settlement between the parties. The applications order made thereon is impugned herein, came to be filed by the applicant/Dallah Albaraka (Ireland) limited/non party claiming themselves to be the proven creditor of the first respondent/Pentamedia graphics Ltd. and the reliefs sought for in the applications are (1) to recall and set aside the order dated 28.2.2011 passed in C.P. No. 106 of 2010 (ii) to implead the applicant as party to the Company Petition (iii) to stay the operation of the order dated 28.2.2011 and (iv) to implead one Mr. V. Chandrasekaran as party respondent in the Company Petition. All the applications were disposed of by the impugned common order mainly on the ground of locus standi of the applicant to maintain any action against legality and validity of the order passed in the Company Petition. Hence, these appeals before this Court.

2. The present company appeals are admitted on the following questions of law:

1. Whether the company law board has power to review or recall its own order under regulation 44 of the Company Law Board regulations?
2. Whether the order dated 28.2.2011 is liable to be recalled and set aside as the same is perverse and disregard to the issue before the Company Law Board?
3. Whether the Order impugned is liable to be interfered as same is based on erroneous, baseless findings?
4. Whether in the facts of the case, the company law board was right in passing the order impugned?
5. Whether the company law board was right in holding that the allegations of fraud could not be considered in summary proceedings?
6. Whether the order of the company law board is disregard the principle laid down in the decision reported in?

3. The Additional question of law framed by this Court is:

1. Whether rejection of the petition filed by the applicant by the Company Law Board on the ground that the applicant has no locus standi is legally sustainable?
4. Before going into the questions of law raised herein on merits, few facts, which are relevant herein for consideration are as follows:

There was money transaction between the appellant and the first respondent giving rise to suit No. 2006 Folio 1140 before High Court of Justice Queen's Bench Division, Commercial Court, "England & Wales" for recovery of a sum of US \$12,504,045.62 together with liquidated damages accruing daily at US \$2,658.54. The claim was preferred on 7.11.2006 on the basis of deed of guarantee and indemnity bond executed by the first respondent on 21.9.2000. The Commercial Court of England and Wales decreed the claim on 13.07.2007 for US \$13,362,754.05 together with UK pound 47,512.15 towards cost. The judgment was though served on the judgment debtor, no appeal was preferred against the same. While so, the appellant preferred C.P. No. 134 of 2008 before this Court for winding up of the first respondent company and the copy of the decree and certificate issued u/s 10 of the Administration of Justice Act were also enclosed along with the company petition. The company petition was seriously contested that the decree was not obtained on merits and no cause of action arose within the jurisdiction of the other Court for deciding the claim and there was no service of notice and the decree awarded was contrary to the principle of law and the decree cannot be, under the provisions of Section 13 of CPC construed to be conclusive one and the first respondent got bonafide defence and the first respondent is a growing concern and is functioning, as such, there is no cause of action for filing winding up petition.

5. However, the Company Petition was dismissed mainly on the ground that the

decree, order sheet of which, is filed along with the Company petition was not one on merits. Aggrieved against the same, the appellant preferred an appeal in O.S.A. No. 27 of 2009 before the Division Bench of this Court. The OSA was also dismissed by order dated 07.07.2010 thereby confirming the order of the company Court however leaving the question as to whether the English judgment was one on merits to be open to be decided by the Company Judge on the basis of the judgment copy claiming to be in the possession of the decree holder with also liberty given to the decree holder to either file a suit on the judgment obtained or to straight away execute the judgment u/s 44A of CPC by satisfying the parameters of Section 13 CPC and with liberty given to the respondent to raise all the defence that are legally sustainable before the Court concerned.

6. The appellant filed two execution petitions on 27.10.2010 u/s 44A of CPC for the reliefs (i) for attachment of immovable properties belonging to first respondent and (ii) for attachment of shares of the first respondent in the second respondent/Mayajaal entertainment limited and Num TV Ltd. who is the second respondent herein. Much before the EPs are numbered the first respondent/judgment debtor came forward with one Company Petition during December 2010 before Company Law Board, Chennai bench for the following reliefs : (i) regulation of the conduct of the company affairs in future (ii) to reconstitute the Board of directors of the respondent company in a manner to give due representation to the petitioner therein proportionate to its share holding alternatively to direct the respondent company to purchase 48.71% of shares of the petitioner as per the value ascertained by the independent valuer and upon such terms and conditions and consequently to direct the respondent/Mayajaal to appropriately restructure its share capital account and for other appropriate reliefs in accordance with Section 402 and Schedule XI of the Companies Act. The reliefs are sought for by alleging serious acts of commissions and omissions amounting to acts of oppression and mismanagement by the respondents therein. The Company Petition was taken up on file as C.P. No. 106 of 2010.

7. Pending Company Petition the EPs were numbered as E.P. Nos. 299 and 300 of 2011 on the file of this Court. The claimant decree holder has also come forward with A. No. 5107 of 2011 in E.P. No. 300 of 2011 for an order of injunction restraining the first respondent herein their men, servant from encumbering alienating or in any manner from dealing with the shares held in Mayajaal Entertainment Ltd. and NUM TV Limited, Mauritius and by order dated 2.11.2011 in the same, the judgment debtor is directed to keep the shares if any without any alienation till 8.11.2011, the 1st respondent herein was served with notice in the EP much before 8.11.2011 and the EP was being contested by the first respondent by filing counter on 8.11.2011, thereby questioning the decree awarded on merits and by questioning the enforceability of the award on merits. The first respondent has in the counter specifically stated about C.P. No. 106 of 2010 and the Memorandum of Understanding arrived at during February 2011 in the same and the nature of the order passed thereon. It is definitely stated therein that in pursuance of the order made in the company petition, the shares

held by the first respondent/Pentamedia in Mayajaal got extinguished and he does not any longer own any shares in the said company so as to maintain the EP for attachment of the same.

8. In the meanwhile, the Company Law Board passed an order of injunction in C.P. No. 106 of 2010 thereby restraining the respondent from in any manner changing or attempting to change the company/organisation structure of the first respondent and the Company Law Board is also pleased to appoint by order dated 11.01.2011 M/s. Babu peram and associates, Chartered Accountant, Chennai as the auditors to value as on 10.2.2011, the equity shares held by the first respondent. M/s. Babu Peram and associates filed their valuation report thereby valuing the equity share of M/s. Pentamedia Graphics Limited in Mayajaal at Rs. 39.50 per share rounded of to Rs. 40 per share and the value is reported to be computed under the purchase value method, book value method, market value method, discounted cash flow method. The valuation is not accepted by the Pentamedia Graphics Limited and pending arguments on the issue of valuation of equity shares, Pentamedia Graphics Limited offered their equity shares at Rs. 50 per share. Thereafter, the parties entered into an amicable settlement regarding the valuation and mutually agreed that the equity shares held by the Pentamedia shall be purchased by Mayajaal company at Rs. 45 per share. As per the agreement the Mayajaal entertainment agreed to acquire the equity shares of not only Pentamedia but also its nominee share holders viz., Mr. R. Kalyaraman, Mr. K. Maniprasad, Mr. C.V. Ravi, Mr. R. Rajagopalan, Mr. Chandrasekaran and Mrs. Viji Kannan in the same rate in terms of Section 402 of the Companies Act and entire sale consideration was agreed to be payable over 12 months commencing from the date of any order in terms of Memorandum of Understanding and until the payment is made Rs. 75,95,01,000/- was agreed to be treated as unsecured loan by the first respondent in his books of accounts. In pursuance of the settlement the same was reduced into writing by way of Memorandum of Understanding and the same was signed on 26.2.2011 and C.P. No. 106 of 2010 is disposed of in terms of the same, on 28.2.2011 thereby the Memorandum of Understanding is taken up on record and Company petition is disposed of in terms of MoU and sanction is accorded to Mayajaal Entertainment Ltd. to purchase the shares of Pentamedia and consequently, the shares of Mayajaal stood reduced from the capital.

9. As per the tabular statement enclosed in the typed set of papers filed by the respondents 2 to 6 before this Court, the amount payable to Pentamedia by Mayajaal Entertainment towards sale consideration is paid towards settlement of liabilities of Pentamedia to third parties as follows:

10. As A. No. 5107 of 2011 is filed much after the disposal of C.P. No. 106 of 2010, the counter came to be filed in the same by raising objection against maintainability of the relief of attachment sought for in the EP and the same is opposed in terms of the order passed in C.P. No. 106 of 2010. On being informed so, the appellant came forward with four applications which are subject matter of

the present appeals in C.P. No. 106 of 2010 before the Company Law Board for the reliefs as stated supra. All the applications were dismissed by the Company Law Board by common order dated 11.01.2012 on two grounds (i) the Company Law Board cannot review its own order by exercising inherent power provided u/s 44 of the Company Law Board regulations (ii) The status of the applicant Dallah Albaraka (Ireland) Ltd. as creditor of Pentamedia is pending determination in E.P. Nos. 299 and 300 of 2011 and the applicant is not member of either Pentamedia Graphics Ltd. or Mayajaal entertainment Ltd., as such the applicant has no locus standi to file the petitions and is hence not entitled to any reliefs even if the Company Petition is reopened. The Company Law Board while disposing of the applications not accepted the plea of act of fraud played upon the Court by the parties to C.P. No. 106 of 2010. Aggrieved against the same, the applicant has come forward with these four appeals before this Court.

11. The learned senior counsel representing the appellant herein would before this Court seriously question the genuineness and bonafide of the parties to C.P. No. 106 of 2010 in filing the Company petition and in arriving at the settlement and in obtaining an order in terms of MoU for purchase of the shares and for reduction of shares. It is their case that the Company Petition came to be filed only to defraud and defeat the right of the appellant/decreed holder to get any relief in EP for recovery of the decree amount from the first respondent/judgment debtor. It is also contended that the entire proceedings relating to C.P. No. 106 of 2010 is in violation of the procedure laid down under the relevant provisions of law under the Companies Act and it is an outcome of collusion between the parties and act of fraud played upon the Court and is hence vitiated by illegality and to be held non-est in law.

12. Per contra, the learned senior counsel representing the contesting respondents would oppose the reliefs not only by defending the genuineness of the parties in approaching the Company Law Board and obtaining judicial order for purchase of shares held by the first respondent in second respondent/Mayajaal but also by seriously denying the locus standi of the applicant to intervene into the affairs of Mayajaal Entertainment Ltd. According to the contesting respondents the company petition came to be filed much before EPs were numbered and much before the first respondent/judgment debtor was put on notice about the EPs and the reliefs sought for therein and the settlement arrived at between the parties is not lacking in any bonafide and is only to safeguard the rights of both parties and the sale consideration is adequate and paid towards settlement of third party creditors.

13. Heard the rival submissions made on both sides.

14. From the facts and circumstances made available herein, the issues to be considered herein are (i) whether the appellant/applicant has any locus standi to maintain any action against validity of the judicial proceedings in C.P. No. 106 of 2010 by getting himself impleaded in the proceeding relating to C.P. No. 106 of 2010 (ii) whether the applicant has made out any ground much less valid ground

to recall the order dated 28.2.2011 made in company petition and to reopen the same and (iii) whether any act of fraud is played upon the Court in obtaining the order in C.P. No. 106 of 2010.

15. It may be true that the appellant herein obtained foreign award against the first respondent/Pentamedia for recovery of huge amounts. The enforceability of the same came to be considered at the first instance in C.P. No. 134 of 2008 filed by the applicant for winding up of Pentamedia, the first respondent company herein. It is held therein that the award was not one on merits and cannot be enforced and such order was again confirmed in appeal in O.S.A. No. 27 of 2009 however, the liberty was given to the applicant to either file a suit or to straight away file EP, without prejudice to the right of the parties to contest the same on all issues. The appellant chose to straight away file EPs along with the copy of the judgment on merits. The Execution Petition in E.P. Nos. 299 and 300 of 2011 are disposed of on 19.6.2012 by common order, wherein the learned Master has sought to decide both the enforceability of the award and the maintainability of the reliefs sought for in EP and right of the decree holder to obtain such reliefs and the same are decided in favour of the decree holder.

16. However, the orders impugned herein are much before the decision on executability and enforceability of the award. The status of the applicant was not yet established on the date of institution and disposal of C.P. No. 106 of 2010. As a matter of fact, C.P. No. 106 of 2010 is filed much before the EPs are numbered and no notice was served upon the first respondent in the same and is disposed of before any order of injunction is passed in A. No. 5107 of 2011, against disposal of shares of the first respondent held in the second respondent. It cannot be equally disputed that till date the appellant has been claiming the status of creditor only in respect of first respondent/Pentamedia and not in respect of Mayajaal. The appellant is neither a member/share holder or creditor nor associated with Mayajaal whose company affairs and shares are dealt with in C.P. No. 106 of 2010. It is but relevant to recollect at this juncture, that the Company Law Board rejected the applications which are impugned herein by observing that the status of the appellant as creditor of the first respondent/Pentamedia is yet to be established and the same is also not the member of both the companies Pentamedia or Mayajaal. That being so, the locus standi issue is to be decided not only with regard to the status of the appellants as creditor of the first respondent but also in respect of member of the second respondent/Mayajaal. While the first issue i.e., relating to the status of the appellant for the purpose of enforceability of the decree was pending determination on the date of institution and disposal of C.P. No. 106 of 2010, the appellant is till date in no manner associated with second respondent company. In that event, in so far as the affairs relating to the second respondent Mayajaal is concerned the appellant has no legal relationship and cannot make any complaint against the internal affairs of the same company. That being so, the right if any available to the appellant is as rightly argued by the learned counsel for the contesting respondent to seek the remedy against the first respondent/pentamedia that too

for the limited purpose of recovery of the amount due under the money decree and the appellant cannot maintain any action against the second respondent that too in respect of the matter relating to management and share holding pattern of the second respondent company which was the issue decided in C.P. No. 106 of 2010.

17. The issue relating to locus standi may also be considered in different angle. It is seriously argued by the learned senior counsel that the proceedings relating to C.P. No. 106 of 2010 is fraudulent and collusive in nature as it is the arrangement secretly made between the respondents 1 and 2, so that, the one should institute the CP against the second respondent to obtain a binding judicial decision from the tribunal to defeat the right of the appellant/third party decree holder. In my considered view the facts available herein would not support the plea of any fraud by or collusion between the parties in respect of proceedings relating to company petition. It is also argued that the CP alleging acts of oppression and act of mismanagement by majority share holder against minority share holders is unknown to law and the same exposes fraudulent or collusive nature of the proceedings. This argument loses its significance in the light of specific averments raised by the first respondent in the company petition to the effect that his share holding in the second respondent company is 48.71% which is below 50%. In that event, the first respondent cannot be treated as majority share holder and the company petition for the reliefs as stated supra cannot be treated as petition by majority share holders against minority share holders.

18. Even otherwise the Division Bench of Karnataka High Court has in para 11 of its judgment in Ultrafilter GMBH Vs. Ultrafilter (India) P. Ltd. and Another held that there is no prohibition for majority share holder to maintain the petition u/s 391. It is held so by applying the views of the Supreme Court in Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, . The Karnataka High Court has categorically observed in para 11 of its judgment that Section 397 does not postulate difference between the majority and minority share holder and any member of the company could complain u/s 397 with regard to mismanagement, the member who complains of shall only satisfy the requirement in terms of Section 399 that the member shall hold not less than 1/10th of the issued share capital of the company or in the case of the company not having share capital not less than 1/5th of the total number of its members therefore the only restriction to maintain the petition under Sections 397 and 398 is as contained in Section 399 and if the condition of Section 399 got fulfilled not only such member having majority shares can maintain a petition but has statutory right to do so and the majority therefore becomes artificial minority and it is entitled to maintain a petition under Sections 397 and 398. As such notwithstanding the extent of share holding i.e., whether major or minor, the maintainability of the C.P. No. 106 of 2010 which is also under Sections 397, 398 and 399 cannot be questioned by the first respondent.

19. Regarding the manner in which the compromise is arrived at between the

parties and the manner in which the Company Petition is disposed of in terms of MoU and the nature of the order passed therein serious argument is advanced herein regarding the conduct of the management in coming forward to purchase the shares of the member and regarding the price per share arrived at and the mode of payment. However, in my considered view the same cannot be the subject matter of grievance in so far as the appellant is concerned for the following reasons : the reading of the MoU would reveal that the Company Petition was duly entertained and was duly proceeded with in accordance with law by giving notice to other parties and by duly passing an interim order and by duly appointing Chartered Accountant for valuing the shares in connection with determination of alternative relief sought for purchase of shares. The shares valued by the Chartered Accountant is Rs. 40 and the price offered by the petitioner therein is Rs. 50 and the price agreed is Rs. 45 per share. Though the amount is agreed to be paid over 12 months the same is paid towards discharge of third party dues as per the list enclosed at page 18 of the typed set of papers filed by the first respondent. It is also noteworthy to mention that some of the third party creditors whose dues are settled by the second respondent/Mayajaal out of the sale consideration are banking institutions as seen from the list produced as asked for by the appellant. The annual reports of the relevant years pertaining to the first respondent produced herein by way of typed set of papers have also furnished details about those banking creditors and about the Company's approach to Company Law Board for appropriate order for relooking its investment in Mayajaal. The balance sheet of the second respondent Mayajaal would also reflect the exact position regarding the share holding of the first respondent in the second respondent company between March 2011 and March 2012. The balance sheet is enclosed in typed set of papers. Regarding value of the shares, the value per share agreed is more than the value filed by the Chartered Accountant appointed by the Company Law Board.

20. Further the Hon''ble Supreme Court has in Needle Industries India Ltd. v. Needle Industries (Neway) India holding Ltd. (supra) case observed in Paras 120 and 121 that the value of the shares even if below the market value is not material provided the issue of shares is bonafide and in good faith. Regarding the payment of dues to one set of creditors our Hon''ble Supreme Court in the judgment in Union of India (UOI) Vs. Rajeswari and Co. and Others, is also to observe that "the preference by a debtor of one creditor over the others is not ipso facto deemed fraudulent. It is open to a debtor to prefer one or more creditors over others in the payment of his debts, and so long as he retains no benefit in the property. The mere circumstance that some creditors stand paid while others remain unpaid does not attract the provisions of Section 53 of the Transfer of Property Act. The transfer of sale of assets of the company for payment of debts was genuine. There was no evidence to establish the allegations of the income tax authorities that some of the debts discharged were owed to persons who were also Directors of the company and that the consideration which passed for the sale of the assets was inadequate and the

assets had been undervalued. Once it was found by the High Court that the sale was effected for the purpose of discharging the debts payable by the company and that the consideration was not inadequate, it was also immaterial that the transfer was effected in favour of a person (the partnership firm) who was not a creditor of the company. The claim of the income tax authorities for tax arrears based on Sections 532 therefore cannot be sustained."

21. The fact that the sale consideration is paid towards discharge of dues of the third parties as duly reflected in annual reports would to considerable extent go to support the bonafide of the parties in obtaining judicial order whose validity is questioned herein, as such no serious dispute can be raised regarding the price per share arrived at and mode of payment of the amount.

22. As far as the allegations raised herein regarding the act of fraud allegedly played upon the Court and the collusion between the parties in obtaining judicial order, the distinction between the act of fraud and the act of collusion is explained by the Hon''ble Supreme Court in (i) Nagubai Ammal and Others Vs. B. Shama Rao and Others, ; (ii) Ramachandra Ganpat Shinde and another Vs. State of Maharashtra and others, and (iii) A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, . The well laid down legal principles enumerated in the above authorities are that (i) one who comes to the Court, must come with clean hands (ii) fraud vitiates all judicial acts, whether in rem or in personam; (iii) fraud and justice never dwell together or fraud and deceit ought to benefit none; and (iv) it is but the primary duty and highest responsibility of the Court to correct such orders at the earliest and to restore the confidence of the litigant public, in the purity of fountain of justice.

23. The Hon''ble Apex Court has in Nagubai Ammal and Others v. B. Sharma Rao and Others (supra) made a fine and fundamental distinction between the act of fraud and act of collusion or fraudulent and collusive proceedings. It is held in para 15 that "collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against other in order to obtain the decision of a judicial tribunal for some sinister purpose". Whereas, in the fraudulent proceedings, the claim made therein is untrue but the claimant has managed to obtain the verdict of the Court in his favour and against his opponent by practicing fraud on the Court and such a proceeding is started with a view to injure the opponent and there can be no question of its having been initiated as the result of an understanding between the parties."

24. In the present case, going by the definition and distinction as laid down by the Apex Court, no act of fraud can be entertained as the proceedings is not between the first respondent and the appellant, but between the first respondent and third party. It cannot be also termed as collusive, having regard to the successive events transpired during and after the proceedings as discussed above and the conduct of the parties in ultimately settling the amount out of sale consideration due to third party creditors. If this conduct is viewed in the light of the Supreme Court verdict about the right of the debtor to prefer one creditor

over other, no collusiveness can be attached to the judicial proceedings in C.P. No. 106 of 2010.

25. Even assuming it to be either collusive or fraudulent in nature, here again, the locus standi issue arises. As rightly argued by the learned counsel for the respondent, by relying upon the judgment in Ramachandra Ganpat Shinde and Others v. State of Maharashtra (supra) case the applicant, who is third party to the proceedings, has no right to file application for review or recall. As on the date of institution of C.P. 106 of 2010 and MOU and disposal, the right of the appellant to proceed against the movables/shares of the first respondent decree holder was not crystalised and no allegations of fraud and collusion can be under such situation thrown against the parties to C.P. No. 106 of 2010. It is at the risk of the repetition stated that as on the date of institution of C.P. No. 106 of 2010, EP was not numbered as such the same cannot be deemed to be pending to attribute any knowledge to the first respondent about the same and to presume any secret arrangement between the parties to C.P. No. 106 of 2010. Even assuming that the proceedings between the parties as a convenient arrangement, the same cannot be construed to be secret proceeding to defeat and defraud the right of the appellant herein, as on the date of the same no order of attachment of the movables was in force. The order that was in force as on the date of filing of C.P. No. 106 of 2010 is the dismissal order made in OSA which is adverse to the appellant. In that event, no malice can be attached to the judicial proceedings initiated during the relevant point of time.

26. In this context, other serious argument advanced on the side of the appellant is about the order granting sanction to the second respondent company for purchasing the share of the first respondent and consequential order of reduction of share capital. It is sought to be argued that the order regarding reduction of share capital without following the procedure under Sections 100 to 104 of the Companies Act is legally not valid. This aspect is directly answered by the Hon'ble Supreme Court in the judgment in Cosmosteels Private Ltd. and Others Vs. Jairam Das Gupta and Others, . The Supreme Court has in the above cited authority, categorically observed that when the Court is moved to confirm the resolution for the reduction of share capital under Sections 100 to 104, the Court may in its discretion dispense with the procedure prescribed in that group of sections. It is also observed in para 11 that discretion can be exercised even if the petition is disposed of on a compromise between the parties. The only requirement is that the Court before sanctioning the compromise, would satisfy itself that the direction proposed to be given by it pursuant to the consent terms would not adversely affect or jeopardise the interests of the creditors. Applying the same view to the present case this Court is inclined to hold that the execution petition itself has not reached even initial stage on the date of MOU and the date of disposal of the petition on 28.2.2011, as such the Company Law Board has no occasion as on the date of disposal of C.P. No. 106 of 2010 to consider the interest of non party/creditor if any.

27. It is also held in para 10 of the same judgment in *Cosmosteels Pvt. Ltd. and Others v. Jairam Das Gupta and Others* (supra) that procedure prescribed for reduction of share capital in sections 100 to 104 need not be required to be followed in order to make any direction for purchase of the shares given u/s 402 and consequent reduction in share capital to be effected. The supreme Court has also rejected the apprehension voiced by the learned counsel for the creditor as unfounded that if the Court directs the Company to purchase the shares of some of its members while granting relief against oppression, the company would part with its funds which would jeopardise the security of the creditors of the company and that if such a direction for reduction of share capital can be given by the Court behind the back of the creditors, the creditors would be adversely affected and therefore, while giving direction u/s 402 directing the company to purchase the shares of its members, though it is not obligatory upon the Court to give notice to the creditors, such notice ought to be given in the interests of the creditors. Thus, the observation of the Supreme Court in paras 10 and 11 would make it very clear that the Court is empowered to give direction to the company to purchase the shares of some of its members u/s 402 in the petition filed against oppression. While doing so, it is not obligatory for the Court to give notice to the creditor and the creditor has no right of hearing. It is noteworthy to mention at this stage that any other member, shareholder or creditor of either first respondent/Pentamedia in the second respondent/Mayajaal have not come to Court with similar grievance as that of the appellant herein.

28. The discretion of the Court to pass any suitable orders in the petition under Sections 397 and 398 in exercise of discretionary nature of power vests with the Court is wider in nature while disposing of the petition under sections 397 and 398 is the principle reiterated in the following decisions in (i) *M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another*, (ii) *Bennet Coleman & Co. v. Union of India and Others* (1977) 47 CC 92 (DB) Bombay High Court and (iii) *Debi Jhora Tea Co. Ltd. Vs. Barendra Krishna Bhowmick and Others*, Calcutta High Court. In all these cases, our Supreme Court and other High Courts have elaborately dealt with the discretionary power of the Court under sections 397 and 398 and held that there can be no limitation on the Court's power to pass orders that may be required for bringing to an end the oppression or mismanagement complained of and to prevent further oppression or mismanagement in future or to see that the affairs of the company are not being conducted in a manner prejudicial to public interest. *M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja and Another* (supra). Sections 397 and 398 of the Act empower the Company Law Board to pass appropriate orders and the same can give diverse relief to keep the company functioning. It is also held by Calcutta High Court that when the Court u/s 398 read with Section 402 of the Act has the power to supplant the entire corporate management, the Court can give appropriate direction which are even contrary to the provisions of either Memorandum of Articles of Association of the company or Companies Act. Similar observation is made in another case reported in *Mohanlal Ganpatram Vs. Shri*

Sayaji Jubilee Cotton and Jute Mills Co. Ltd., , wherein the Gujarat High Court following the earlier decisions, held that the remedy provided under Sections 397 and 398 is of preventive in nature. It is further held therein that the object and purpose of the remedy however, remained the same namely to cure the mischief of oppression or mismanagement on the part of controlling shareholders by bringing to an end such oppression or mismanagement so that it does not continue in future. The remedy was intended to put an end to a continuing state of affairs and not to afford compensation to the aggrieved shareholders in respect of acts already done, which were no longer continuing wrongs.

29. The Supreme Court has also in para 172 of the judgment in Needle Industries India Ltd. v. Needle Industries (Neway) India holding Ltd. (supra) case, categorically observed that even in the event of the failure to make a case of oppression, the Court is not powerless to do substantial justice between the parties.

30. The Division Bench of Karnataka High Court has also in para 25 of the decision in Ultrafilter GMBH v. Ultrafilter (India) P. Ltd. and Another (supra) referred to the judgment of the Supreme Court in M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja and Another (supra), wherein it is observed that Section 402 provides for the power of the company law board on an application made u/s 397 or Section 398 of the Act which includes the powers to pass any order providing for the purchase of the shares or interests of any member of the company by other members of the company. It is further held therein that the Company Law Board has jurisdiction to pass one such order in the interest of the company and such jurisdiction must be held to be existing.

31. The Supreme Court has in para 14 of the decision in Punjab State Industrial Dev. Corporation Ltd. Vs. P.N.F.C. Karamchari Sangh and Another, observed that when there are two independently legal entities no order can be passed that one company will be liable for the dues of the other to a third party without consideration of the question of legal liability of the company sought to be made liable, as sought to be done in the present case.

32. Regarding the locus standi, the Division Bench of our High Court in para 41 of the decision in Amalgamations Limited (Now Amalgamations (P) Ltd.), A. Sivasailam (died) and A. Krishnamoorthy Vs. Shankar Sundaram and Others observed that shareholder of a holding company cannot complain of oppression by a subsidiary in which he is not a member as there is no legal relation between him and the subsidiary company. Like wise, the applicant, who is not member nor share holder in "Mayajal" is not permitted to raise any grievance regarding shareholding pattern of the same. Thus except the right to execute the money decree against the first respondent, the appellant has no other remedy to raise any grievance either against the first respondent or the second respondent in respect of judicial proceedings which ultimately culminated in an order for purchase of shares of the first respondent by the second respondent and for consequential order for reduction of share capital of the second respondent

company.

33. Our Hon"ble Apex Court in the judgment in *Cosmosteels Pvt. Ltd. and Others v. Jairam Das Gupta and Others* (supra) while dealing with an argument relating to right of notice, held that the right to notice by reason of any rule of natural justice, which a party may establish, must depend for its existence upon proof of an interest, which is bound to be injured by not hearing the party claiming to be entitled to a notice and to be heard before an order is passed. Whereas, in this case, no such right is available to the appellant to intervene in the company petition relating to second respondent Mayajaal with whom the appellant is not associated with any manner. The appellant, who is total stranger in respect of affairs of Mayajaal has no say or no right to be heard, even in the event of the order dated 28.2.2011 be recalled and proceedings be re-opened. As rightly pointed out by the learned counsel for the contesting respondents, the discussion made above reiterated that the remedy available to the appellant is not by way of the reliefs sought for in the applications impugned herein.

34. Regarding the power to recall or review its own order the Hon"ble Apex Court in the above authorities and also in the judgments in (i) *United India Insurance Co. Ltd. Vs. Rajendra Singh and Others*, and (ii) *Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd.*, has categorically held that every Court or tribunal has the power u/s 151 of the CPC to recall its own order, if obtained by practicing fraud on them or where the Courts are misled by a party and that the company Law Board would have the power to review its own order in case the finding and the relief granted are based on fabricated or forged documents or the order is obtained through fraud of such dimensions as would affect the very basis of the claim. At the same time, the Hon"ble Supreme Court has in *United India Insurance Company Limited v. Rajendra Singh* (supra), observed that the power of recalling the order must be exercised very rarely.

35. The Supreme Court has also in para 11 of the decision in *Ramachandra Ganpat Shinde and Others v. State of Maharashtra* (supra) observed that no third party has right to intervene and challenge any judicial order under Article 32 of the Constitution. The Hon"ble Supreme Court in the authority in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, observed that the inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it and an order made by it, contrary to the terms of a statute and judicial precedents, can be in exercise of its inherent jurisdiction, set aside. But it is well laid down legal principle that Company Law Board can invoke the inherent power in the application filed under regulation 44 of the Company Law Board Regulations, recalling and setting aside its own order on the ground that fraud was played on the Board, can be done sparingly at the instance of the parties to the proceedings.

36. The learned counsel for the appellant cited the following authorities for the legal proposition that compromise decree obtained by fraud cannot be allowed to

sustain and is liable to be set aside. The first authority cited is A.A. Gopalakrishnan Vs. Cochin Devaswom Board and Others, . It is laid down therein that when the compromise was alleged to have been arrived at by fraud/collusion made against statutory authority, the High Court can examine validity of the same even when the same was questioned, even by the third party. However, the observation is not applicable to the facts of the present case, considering the nature of the interest questioned herein, contra to the nature of the interest sought to be protected therein i.e., properties of deities, temples and Devaswom Boards. It is observed by the Hon''ble Supreme Court therein that Courts as well as Government, members or trustees of board/trusts and devotees owe a duty to protect or safeguard such properties from usurpation by collusive or fraudulent means with active or passive collusion of authorities concerned, which is not the case herein. In other case in Kiran Arora and Others v. Ram Prakash Arora and Others AIR 1980 Del 99 the third party, who challenged the compromise decree in the suit for dissolution of partnership of accounts, was though not party to the proceedings, but claimed to be one of the continuing partners, as such, his right to question the compromise decree among other partners in respect of same partnership cannot be denied. Further, the compromise was challenged by way of suit and not by way of any application to re-open the proceedings. In another case, in Tara Bai Vs. V.S. Krishnaswamy Rao, which is third case cited on the side of the appellant herein, the compromise decree was questioned, not by third party, but by the second defendant to the suit. The last authority cited on the side of the appellant is S.G. Thimmappa Vs. T. Anantha and Others, . There also, the compromise decree, which is alleged to be vitiated by fraud, undue influence etc., was challenged only by way of separate suit and not by way of any application in the same proceedings. There again, the party, who alleges fraud is party to the proceedings, legality and validity of which is challenged and not any third party.

37. Viewing from any angle, the applicant is disentitled to seek any relief as sought for in the applications arising out of which are the present appeals, not only in respect of locus standi issue, but also on merits. In the result, all the company appeals are dismissed. No costs.