

(2011) 02 CAL CK 0037

In the Calcutta High Court

Case No : A.C.O. No's. 63, 123 and 191 of 2010, A.P.O.T. No. 282 of 2010, C.A. No. 13 of 2010 and C.P. No. 3 (Kol) of 2009

Descon Ltd.

APPELLANT

Vs

Biman Behari Sen and Others

RESPONDENT

Date of Decision : 07-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 24
Companies Act, 1956 — Section 397, 398, 399, 402

Citation : (2011) 2 CALLT 61 : (2011) 102 CLA 141 : (2011) 162 CompCas 631 : (2011) 162 CompCas 618 : (2011) 107 SCL 477

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

Bench : Single Bench

Advocate : P.C. Sen, S.N. Mookerjee, Debangshu Basak, Rajratna Sen, S. Roy and A. Das, for the Appellant; S.K. Kapoor, Ranjan Bachawat, Aniruddha Roy and S. Moitra for Respondents Nos. 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

I.P. Mukerji, J.

Background:

1. This is an appeal by the company from an order of the Company Law Board. They passed it on March 30, 2010 (Biman Behari Sen v. DESCON Ltd. (No. 2) (2011) 162 Comp Cas 627). The Applicants before it, being Respondents Nos. 1, 2 and 3 here, who will hereafter be referred to as the Respondents/Applicants are minority shareholders in this company called Descon Ltd. They filed an application under Sections 397 and 398 of the Companies Act, 1956 ("the Act"), before the Board alleging wrongful control of the company by the majority shareholders causing loss to it and being prejudicial and oppressive to its members. Those proceedings were marked as C. P. No. 3 (Kol) of 2009. In aid of such proceedings they took out an application marked as C. A. No. 13 of 2010. In that application they sought an order of injunction restraining the company

from selling their 13,36,220 shares in Dishergarh Power Supply Corporation Ltd. (DPSC Ltd.) and for other reliefs. The Board by its said order prima facie justified the sale of those shares. It refused injunction. However, it went on to pass a restraint order upon the company forbidding it from utilising the sale proceeds.

2. The company is in appeal. It feels seriously aggrieved by this order. They argue that if the Board could hold that the sale of shares was justified, it could not impose a bar on the company to utilise the funds.

3. This appeal has been argued for several days along with a connected appeal.

4. Now, I will discuss the facts more elaborately.

Facts:

5. The Appellant held 13,36,220 equity shares in a company called DPSC Ltd., which was 32.31 per cent. of the shareholding. Andrew Yule and Co. Ltd., was also a shareholder in this company. Its affairs were under consideration by the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The Board tried to formulate a scheme for its rehabilitation. It appears that the scheme was implemented. On or about August 8, 2008, Andrew Yule and Co. Ltd., collaborated with five other shareholders for sale of their shareholding in this company DPSC. They altogether had 57.17 per cent. shares in it.

6. At that point of time the managing director of the Appellant was also the managing director of DPSC Ltd.

7 The Appellant saw this plan for sale of shares as resulting in its ouster from the management of this company.

8. It approached the Company Law Board. Those proceedings were numbered as C. A. 16 (Kol) of 2008. I will not discuss all their details. They were carried in appeal before this High Court. The exact details of those proceedings were not placed before me.

9. But in such appeal by an order dated November 18, 2009, this High Court appointed a special officer to sell the subject shares in an auction. By that order these 57.17 per cent. shares in DPSC Ltd., were to be sold through a special officer. The offer of one company Orbis Power Ventures P. Ltd., was the highest at Rs. 710 per equity share after sixteen rounds of bidding in an auction. The Appellant also participated in the auction, but unsuccessfully. This High Court was thereafter approached for confirmation of the sale. The sale in favour of Orbis was confirmed by it in January, 2010.

10. Such order of the High Court was challenged before the hon"ble Supreme Court by filing a special leave petition. The hon"ble Supreme Court by its order dated January 29, 2010, directed Orbis Power Ventures P. Ltd., to make a public offer in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. With that observation

the SLP was disposed of. The Appellant was no longer interested in retaining its shares in DPSC, as by virtue of the sale of the said block of shares by Andrew Yule and Co. Ltd. and Ors. it had been reduced to a minority. It wanted to sell its 32.31 per cent. shares in DPSC Ltd., to Orbis Power Ventures P. Ltd., at Rs. 710 per share and ultimately sold them for over Rs. 90 crores.

11. Meanwhile, in 2009, this application under Sections 397 and 398 of the Act was filed by the Respondents before the Company Law Board which was marked as C. P. No. 3 (Kol) of 2009. In aid of that application in or about February, 2010, they made an application being C. A. No. 13 of 2010 for restraining the Appellant from transferring the above shares and for other consequential reliefs.

12. For examination of the order dated March 30, 2010, one has to first ascertain the true nature, purport and scope of Section 397 proceedings before the Board.

13. The Respondents/Applicants' claim to be minority shareholders of the Appellant but having the support of the requisite number of shareholders to maintain an application under Sections 397 and 398 of the Companies Act, 1956. These Applicants complain about formation of a shareholders' trust known as the Descon Shareholders Trust. They also complain about an alleged transfer of shares in favour of the trust and reconstitution of its trustees.

14. The Appellant-company had incorporated a foreign company in the United Kingdom called Descon (U. K.) Ltd. It is its wholly owned subsidiary. The Respondents/Applicants also complain of acquisition by the Appellant-company, shares in DPSC Ltd., at a higher price than that of its book value. They allege that the Appellant-company was considering sale of two flats belonging to it in favour of S. Radhakrishnan, Respondent No. 4 at a price which is below the valuation price. Further the directors have got an interest in some other company Cable Com Services Ltd. By trying to promote it the interest of the Appellant is being sacrificed. Further the books of account of the company are not being properly maintained and audited.

15. As final reliefs, the Respondents/Applicants have sought a declaration that the shareholders' trust is of no effect, for declaring the agreement for sale of two flats in Jodhpur Park in favour of Respondent No. 4 as ultra vires the company, supersession of the board of directors, an enquiry into the transaction relating to Cable Com Services Ltd., and acquisition of 68,702 shares of DPSC Ltd.

16. In aid of the main proceedings, prayers for interim reliefs were made. The case in the part of the application relating to interim reliefs is almost identical to the case made out in the main proceedings. There is a pleading that a proper interim order be passed so that the assets and other properties of the company are preserved. It is stated that Respondents Nos. 2, 3, 4 and 5 and in particular Respondent No. 2 in those proceedings, who are Respondents Nos. 4, 5, 6 and 7 here would dissipate the assets of the company to its detriment and to the detriment of the shareholders. The main thrust of the allegation seems to be

regarding the sale of the two flats in Jodhpur Park.

17. But it appears that a subsequent application was made in February, 2010 before the Company Law Board by the Respondents/Applicants for restraining the Appellant-company from selling the said shares in Dishergarh Power Supply Corporation Ltd.

18. In that application, the impugned order was passed on March 30, 2010 (Biman Behari Sen v. DESCON Ltd. (No. 2) (2011) 162 Comp Cas 627 (CLB)), directing the company not to "divest the sale price" of these shares. This order was passed after holding that the company had sold the subject shares at Rs. 710 per share, at the acceptable rate available. The Company Law Board held as follows (page 630 of 162 Comp Cas):

It is an admitted fact that offer is open for Rs. 710 per share to the stake of Respondent No. 1 company in DPSC Ltd., it being not said as under valued, it being the price double the price initially DESCON purchased from DPSC Ltd., it is to be considered fair price to the shares of Respondent No. 1 company. Nobody knows whether the share value will be more than Rs. 710 or less than Rs. 710 in future, but at present the value is considerably good, selling away the shares being the policy decision of the company, the shareholders with 4.73 per cent. cannot restrain or injunct from trading the shares on the ground that it is prejudicial to the interest of the company. As long as the decision taken by the company is sound and not prejudicial to the company, it cannot be said to be oppressive to any member of the company unless and until it is specifically proved.

Prima facie it is evident that the offer given as Rs. 710 per share is on the higher side, any court is not supposed to interfere either with the trade or actions of the company unless such actions are proved as oppressive. No doubt the Company Law Board is not powerless to pass any just and reasonable order to protect the interest of the minority group. This power is vested with the Company Law Board or with any other court to protect the interest of each member of the company so as to see that they do not suffer from the doctrine of corporate democracy.

Though the act of selling shares of DESCON at this juncture cannot be considered as oppressive, the minority shareholders, i.e., the interest of the Petitioners and the persons who had given consent in writing is involved in the money that come from that sale, this Bench is under an obligation to protect their interest as well. The main petition in this case not having been decided either way, if the company, i.e., the directors of the company, against whom allegations are made, are given free hand to divest the funds, it may cause prejudice to the present shareholders, may be they are little in percentage, their interest as well is to be looked after as long as the company's interest is not affected.

In view of the same, this Bench is of the view that the prima facie case is in favour of the Respondents. If at all this sale is restrained, it is likely that irretrievable injury will be caused to the majority of the shareholders. In view of

the same, the relief sought by the Applicants seeking injunction restraining the Respondents from selling its stake in DPSC Ltd., is not considered.

Therefore, the application is dismissed. The Respondents are hereby directed not to divest the sale price of Respondent No. 1 company's stake in DPSC Ltd., for any purpose, pending disposal of the main company petition.

Arguments of the parties

Appellant

19. The first point argued by learned senior counsel for the Appellant-company was that the Board after consideration of all the facts held that the price at which the shares were sold was more or less the best possible price available to them. The action of the Appellant in making such sale was upheld by the Board, at least at the prima facie stage. Having held so, the Board could not pass any order putting a fetter on the company in their utilising such funds. Such an order passed after holding prima facie that the sale was bona fide was absolutely contradictory to this finding.

20. Secondly, it was argued that there were no reasons whatsoever given by the Company Law Board in support of passing such an order restraining the company from divesting such funds. Moreover, no case had been made out by the Respondents/Applicants upon consideration of which the Board could come to such a conclusion and pass such a drastic order.

21. In support of this proposition, the said learned Counsel cited *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*,

22. Next, it was contended that this order interfered with the management of the Appellant-company without the existence of any cause whatsoever. The Company Law Board had failed to appreciate the well-settled principles of law that a company was free to manage its internal affairs. A clear cut case had to be made out before restraining a company from carrying out its normal business. No such case was made out by the Respondents.

23. Next, it was contended that there was no foundation for this order in the main proceedings. The case run in the interlocutory application was different from the case in the main proceedings. The Company Law Board completely failed to appreciate this discrepancy.

24. Next, it was contended that the very order passed by the Board was very oppressive for the majority.

25. Lastly, it was contended that the order of the Company Law Board was perverse. The Respondents have indulged in an abuse of the process of law, in filing such an application and obtaining such an order.

26. A Division Bench of our court in *Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others*, , stating that the court must be

satisfied that the affairs of the company were being conducted in a manner oppressive to the company, before passing orders in a Section 397 application, was also cited.

Respondents

27. According to the Respondents/Applicants, there was mismanagement of the company and oppression of the minority shareholders.

28. Reference was made to the balance-sheet of the Appellant-company as on March 31, 2008, to show that it was a profit making enterprise. The balance-sheets for the years 2004 to 05 and 2005 to 06 were also placed to substantiate such submission. Mr. S.K. Kapoor, learned senior counsel for the Respondents has shown from the balance-sheet of the Appellant for the year ending March 31, 2008, that the share capital of the company was a little over 40 lakhs; its reserves a surplus about 14.50 crores. The loan fund was a little over 21 crores. These sources of funds were matched by fixed assets shown in the balance-sheet to be Rs. 1,77,47,000 that is a little less than Rs. 2 crores. The company, it was submitted was profit earning. Therefore, there was no need for this company to utilise the proceeds from sale of the shares. It was argued that there was no specific averment as to how the company proposed to utilise the sale proceeds.

29. When this appeal was moved before me on May 19, 2010, I passed an order allowing the company to withdraw a sum of Rs. 25 crores from the sale proceeds to make payment towards its statutory and other liabilities. It was alleged on behalf of the Respondents/Applicants that the Appellant-company has not been able to furnish any particulars of such expenditure. It was submitted that unless restrained by this Court, Respondents Nos. 4 to 7 will dissipate the sale proceeds to the detriment of the company and of its shareholders.

30. Further, it was submitted that the price of the shares was Rs. 1,100 per share or should have been reasonably so on the date of its sale. By selling the share at Rs. 710 per share, the Appellant acting through the said Respondents Nos. 4 to 7 have caused loss to the company. Further, after full consideration of the prima facie case of both the parties, the Company Law Board had passed its order under appeal. Therefore, this Court should not interfere with the finding properly arrived at by it, following the principles in the case *Wander Ltd. and Another Vs. Antox India P. Ltd.*,

Discussion and findings

31. Ordinarily an outsider, which includes the court, is not permitted to interfere with the affairs of a company. It has shareholders who constitute the general body. This general body elects the board of directors to administer the affairs of the company. They are called the insiders. The board is authorised to take most day to day decisions for running of the company. Certain decisions can be taken only by this general body of shareholders in a meeting or acting together without such meeting in some circumstances. Such decision taken by the required

majority binds the shareholders as well as the company. Certain decisions of the board of directors are also subject to their ratification. The board of directors are also empowered to take decisions binding the company. The body of shareholders and the board of directors act in their respective fields but the overall and ultimate control is exercised by the general body of shareholders.

32. Only when the company is wrongfully in control of a body of shareholders or persons, so much so that decisions are taken prejudicial to the shareholders as a whole or any minority group of shareholders or against the interest of the company, are shareholders permitted to approach the court to redress the wrong by passing appropriate orders (see Chapter 17 of Principles of Modern Company Law by Gower and Davies, 8th edition, 2008). This is the spirit of Sections 397 to 399 of the Companies Act. This kind of an application is made before the Company Law Board. Once the Company Law Board takes cognizance of this kind of a wrongful act, it is empowered u/s 402 of the Act to pass a variety of orders in the interests of the company, its members, creditors and so on.

33. The hon''ble Supreme Court of India has said the following in Shanti Prasad Jain Vs. Kalinga Tubes Ltd., in paragraph 14 (page 363):

Section 397 reads thus:

397. Application to court for relief in cases of oppression.:

(1) Any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members (including any one or more of themselves) may apply to the court for an order under this section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the court is of opinion:

(a) that the company's affairs are being conducted in a manner oppressive to any member or members ; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up ;

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

It gives a right to members of a company who comply with the conditions of Section 399 to apply to the court for relief u/s 402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The court then has power to make such orders u/s 397 read with Section 402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner

oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. The law, however, has not defined what is oppression for purposes of this section, and it is left to courts to decide on the facts of each case whether there is such oppression as calls for action under this section.

34. The order of the Company Law Board which is challenged before me, undoubtedly interferes with the right of the company to conduct its own affairs.

35. By its said impugned order it has restrained the Appellant-company from "divesting the sale proceeds". The sale proceeds are over 90 crores. Therefore, an order of restraint upon a company to deal with over 90 crores of its funds is indeed a very serious order.

36. But before proceeding further with this discussion, I would like to point out that there is a lot of difference in selling the subject shares, receiving the proceeds in the funds of the company and utilising it.

37. It does not necessarily follow that just because the Company Law Board had upheld the sale by the company of the subject shares at Rs. 710 per share, it was obliged to permit the company to utilise the funds, applying the same reasoning. Both are completely different.

38. Therefore, it is to be examined whether the order of the Company Law Board restraining spending of such sum by the company can be upheld.

39. The case, in the main proceedings is mainly directed at the alleged shareholders' trust and the interest of some of the directors in another company which according to the Respondents/Applicants before the Board is detrimental to the interest of the shareholders and of the company. The acquisition of the subject shares by the company is challenged, so is contemplated sale of the Jodhpur Park flats.

40. But in a subsequently filed interlocutory application in February, 2010, the Respondents/Applicants before the Company Law Board sought restraint orders upon the company to transfer the shares in DPSC Ltd.

41. There are some pleadings in the main company petition, although very weak, alleging oppression and mismanagement by the said Respondents Nos. 4 to 7 in control of the Appellant. Such pleading is backed up by a substantive application before the Board, where the impugned order was passed. Furthermore, the decision to sell the shares was taken after filing of the main proceedings.

42. Some reasons have been given by the Company Law Board to come to the prima facie finding that the Appellant company had sold its share in DPSC prudently at Rs. 710 per share. That finding of the Board is not challenged. What is challenged is the next finding or conclusion that the company should not utilise

this money. As far as this finding is concerned there is absolutely no reason in support of it. In the absence of reasons it is not possible to probe into the mind of the learned judge, as to the grounds of his satisfaction that such order was required to be passed. The decision in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, that the court of appeal will not interfere with the discretion used by the trial judge in arriving at a prima facie finding, unless such finding or order is perverse or could not have been passed by any reasonable person, cannot apply to this case as the order is without reason. If an order is without reason, the court of appeal is unable to understand the grounds on which the discretion has been used. It is against reason to hypothetically provide reasons so as to support the alleged discretion used. In such a case the respective arguments of the parties have to be assessed by the court of appeal, to assess the grounds which may have impelled the learned judge to use the discretion the way he did. That practice is now obsolete. Every decision maker making adjudication is required to provide reasons in support of the decision and absence of reasons is fatal.

43. But in this case, for absence of reasons I will not send the case back to the Company Law Board. The court of appeal has the same power as of the court trying the original proceedings to come to its own finding, without taking recourse to remanding the matter back to the trial judge (see Order 41, Rule 24 of the Code of Civil Procedure, 1908).

44. The Respondents/Applicants with their supporters have no more than 4.374 per cent. of the share value in the company. It is also true that the case in the main application for interim relief is completely different from the case run by the Respondents/Applicants before the Company Law Board. Nevertheless, a substantive interlocutory application was filed in February, 2010 to restrain the Appellant from transferring the shares in DPSC. There is some whisper about mismanagement and oppression of the minority shareholders without any great deal of particulars.

45. On such pleadings, it is difficult to imagine an order putting an absolute embargo on the company from utilising the major source of its funds that is over ninety crores from the sale of those DPSC shares. Such an order in my opinion not only interferes with the functioning of the company but it tends to throttle its functioning to a very substantial extent.

46. It is alleged in the interim application that after filing of Sections 397 and 398 petition, on January 30, 2010, the Respondents read an advertisement that the company was proposing to sell the subject shares in DPSC.

47. But to sustain this kind of an order a case had to be made out that those in control in the company were in the process of converting the assets of the company to their own use, against the interest of the company, so as to seriously prejudice its interest and those of the shareholders.

48. One submission of Mr. Kapoor, the learned senior advocate for the Respondents/Applicants at the very close of submissions impressed me to some

extent. He argued that the balance-sheet of the company revealed that the sale proceeds were substantially higher than other sources of funds by the company. It was many times greater than its fixed assets. Moreover, according to such balance-sheet, the company was solvent, profit making and did not need the money to carry on its business. Further, if the sum of over Rs. 90 crores was frittered away by the directors before the Company Law Board, the petition could be decided, the money could not be brought back to the till of the company.

49. But nevertheless, I find no substantial case to tie the hands of the directors and other persons controlling the company.

50. Therefore, considering the above prima facie case of the parties and the balance of convenience the order under appeal is modified as follows:

The Company Law Board will decide the main company petition before them within a period of four months from date. Till such decision is made by the Company Law Board the Appellant company will be free to utilise the said sum of over Rs. 90 crores for making capital expenditure for acquiring fixed capital assets of the company. But it cannot encumber or sell them without the leave of the Company Law Board. Further, the Appellant-company will be entitled to make revenue expenditure, payment, advance or investment from the said sum provided that if the estimated disbursement is to exceed 10 crores, in the period the application is under consideration before the Board it has to furnish its estimate to the registry of the Board, upon notice to all parties. Any party will be at liberty to inspect such estimate and to take copies of the statement. The company will be empowered to go ahead with such expenditure or payment only after a period of two weeks from the date of furnishing the same to the Company Law Board, and furnishing of copies to the parties, whichever is later unless any order to the contrary is passed by the Board. The expenditure permitted by the interim order dated May 19, 2010, is confirmed. The fixed deposit, made pursuant to that order may be encashed.

51. The appeal is allowed to the above extent only.

52. No order for costs.

53. Urgent certified photocopy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.