
(2008) 08 MAD CK 0115

In the Madras High Court

Case No : O.S.A. No. 293 of 2008 and M.P. No. 1 of 2008

G. Haresh Chand

APPELLANT

Vs

Gee Gee Granites Ltd. and Others

RESPONDENT

Date of Decision : 28-08-2008

Acts Referred:

Companies Act, 1956 — Section 237, 293(1)

Citation : (2009) 149 CompCas 353 : (2009) 2 LW 54 : (2009) 4 MLJ 692 : (2009) 95 SCL 285

Hon'ble Judges : A.K. Ganguly, C.J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : P. Venkatavaradhan, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Ganguly, C.J.—This original side appeal has been filed against a judgment and order dated July 14, 2008, passed by the learned company judge in the Company Petition No. 256 of 2007, filed by the present appellant. The company petition (hereinafter referred to as the "said petition") was filed u/s 237(a)(ii) of the Companies Act, 1956 (hereinafter referred to as "the said Act") seeking a declaration that the affairs of M/s. Gee Gee Granites Ltd. (hereinafter referred to as the "said company"), the first respondent herein, are liable to be investigated, and as such a direction is prayed for on the Central Government to appoint number of inspectors to investigate the affairs of the said company and to ensure that proper and necessary action was taken on such investigation.

2. In the said petition, the case of the petitioner is that the petitioner and his other family members, who were shareholders of the said company, had entered into an agreement with the second and third respondents in March, 2004, who agreed to purchase the shares of the petitioner and his family members for a total consideration of Rs. 87,50,000. The case of the petitioner is that after the purchase of those shares, the conduct of the second and third respondents is totally against the interest of the shareholders and creditors of the company, and

they are indulging in various fraudulent activities, which demand investigation in the affairs of the said company, to be ordered by the Central Government, and also by the CBI. The further case is that the valuable properties of the said company has been sold for a song and there is total lack of transparency in the conduct of the affairs of the said company, and there is also total lack of corporate governance. It is alleged that several amounts due to the creditors were unilaterally written off by the second and third respondents, and the balance-sheet of the company gives a misleading picture. It is also urged that the sale of the entire factory of the said company is a collusive transaction with the fourth respondent, and the same was done at a very low price. It is further urged that the said sale of the factory virtually amounted to the winding up of the said company and after the said sale the existence of the company became meaningless. It is also alleged that the said sale was not supported by the consent of the shareholders u/s 293(1)(a) of the said Act.

3. The second and third respondents on the other hand, after notice entered appearance, and they denied the aforesaid allegations. Apart from that it was pointed out by them that the petitioner's shareholding since 2007 is only one hundred shares of the said company which amounted to 0.0022 per cent, of the total paid-up capital, and they questioned the bona fides of the petitioner in filing the petition. It was alleged that the petitioner purchased his 100 shares in the open market on November 30, 2007, and within 10 days thereafter moved the court with this petition. It is further stated that the sale of the assets of the said company was pursuant to a resolution passed in its board meeting held on June 8, 2006. The said board meeting was held pursuant to a valid notice. It was further stated that the petitioner managed the company from 1990 to March, 2004 and the dire financial position of the said company is purely due to the petitioner's mismanagement of the company. It was further urged that the present board of directors of the company is constituted under Clause 49 of the Listing Agreement, and the annual reports filed by the chartered accountants also certified the same. It was further stated that the said company diversified its activities and it is wrong to allege that the company has gone into liquidation.

4. In answer to the aforesaid stand of the respondents it was pointed out by learned Counsel for the petitioner that for the purpose of invoking the jurisdiction of the company court u/s 237(a)(ii) of the Act, it is not necessary that a person must have a holding on the day when the sale of the assets of the company took place, especially when the sale has taken place without calling a tender. The contention of the respondents that the date when the transaction took place the petitioner had no interest in the company as a shareholder, is not controverted by learned Counsel for the petitioner.

5. Basically on those allegations, the learned judge of the company court, in a rather well considered judgment, held that under the provisions of Section 237(a) (ii) of the said Act the court has no general discretion to go in a fishing expedition to find evidence. In coming to the said finding the learned judge relied

on the celebrated decision in the case of *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, . The learned company judge also noted that in the subsequent decision of the Supreme Court in the case of *Rohtas Industries Ltd. v. S.D. Agarwal* [1969] 39 Comp Cas 781, wherein the principles in *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, , have been reiterated. In the said decision, pointing out the provisions of Section 237(a)(i) of the said Act, the apex court said that the said section is an inroad on the power of the company to carry on its business and any order passed under the said section may seriously tarnish the reputation of the company. Therefore, only on disclosure of strong materials court can exercise its discretion in ordering an investigation under the aforesaid section. In our view, the learned judge has placed the reliance correctly on those judgments, as also on the judgment in the case of *V.V. Purie Vs. E.M.C. Steel Ltd. and Others*, , wherein it has been said that a person having no interest or concern with the company as a shareholder, creditor or otherwise has no locus standi to invoke the aforesaid provision of the said Act.

6. The learned company judge, however, did not agree with the contention of the respondents that minority shareholder like the petitioner having 0.002 per cent, stakes cannot invoke the jurisdiction to order the probe. The extent of the shareholding is of no consequence. But on the day the allegedly offending transaction took place the petitioner complaining must have some interest. In this case on the date of sale of company's properties, the petitioner had no interest. Therefore, by purchasing the shares at a later point of time the petitioner cannot pray for a direction to probe the past transactions. The learned judge made a valid distinction between the interest of the shareholder to invoke the provision of the said section and the doctrine of public interest. The learned judge also held, and in our view rightly so, that the machinery of investigation can be set in motion only in the context of strong prima facie case as has been held by the Kerala High Court in the case of *Kumaranunni v. Mathrubhumi Printing and Publishing Co. Ltd.* [1983] 54 Comp Cas 370. Relying on the said judgment the learned judge held that the court will look into those allegations which have a strong bearing on the fiduciary duties of the majority or their duty to abide by law. At the stage of ordering an investigation under the said section, the court may not be satisfied about the truth of the allegations, but the court must be satisfied about the strong prima facie content of truth in those allegations. Merely on the grievance of a shareholder about the ways the company's affairs are being carried on, no investigation can be ordered. The learned judge further held that the remedy which is provided under the said section being an equitable remedy the court has to take into account those allegations, which have a bearing on the fiduciary duties of the majority and the petitioner who is seeking this remedy before the court must prove his bona fides and a mere claim of alleged mismanagement is not sufficient to satisfy the test of bona fide.

7. The learned judge has recorded a finding that on November 9, 2006, when the

sale of the company's properties took place the petitioner was not a shareholder, and he purchased the shares in the open market almost one year after the sale was completed. The learned judge has also noted that the grievance of the petitioner that consideration was not paid under the memorandum of understanding between the petitioner and the second and third respondents is not a matter on which a proceeding u/s 237(a)(ii) can be initiated and learned Counsel for the petitioner has also admitted that. The learned judge also recorded that the company by its resolution decided to sell its properties to tide over its financial difficulties. The learned judge also found that the petitioner knew that the company was de-listed, even thereafter, the petitioner purchased the shares as a well-informed person from the open market, and the said purchase was meant only to maintain a petition u/s 237 of the said Act and harass the respondents. Therefore, the learned judge held that there was lack of bona fides on the part of the petitioner.

8. This Court finds that the conclusions reached by the learned judge are supported by various judgments of different courts. In the case of V.V. Purie v. E.M.C. Steel Ltd. [1980] 50 Comp Cas 127, decided by the Delhi High Court it was held that though Section 237 of the said Act is couched in very wide language, the basic limitation under this section is that the courts will not entertain any petition on behalf of private persons under the said section unless the private persons have a personal interest in the matter and unless their rights and interests are in some way affected. The Delhi High Court held that Section 237 of the said Act should not be given an interpretation which would make it possible for persons to start litigation in respect of what does not concern them. Rather the said section should be interpreted in such a way as to enable only those persons to obtain relief whose rights have been affected by the manner in which the affairs of the company are being conducted. The learned judge has rightly relied on the said judgment inasmuch as the finding of fact is that on the date the alleged sale took place the petitioner was not a shareholder.

9. In the case of Kumaranunni Vs. Mathrubhumi Printing and Publishing Co. Ltd., , it has been held that in a proceeding u/s 237(a)(ii) of the said Act the court will only look into those allegations which have a bearing on the fiduciary duties of the majority. The court has also held that the remedy being equitable, the court has to satisfy itself that the petitioner has come to court bona fide for obtaining redressal, and that the proceedings of u/s 237 have not been invoked for any other purpose. In the facts of the instant case, the learned judge has come to a clear finding that the intention of the petitioner is not bona fide. Therefore, the learned judge declined to interfere as the judicial conscience of the learned judge was not satisfied to grant an equitable remedy to the petitioner. When such a decision has been taken by the learned judge it would be improper on the part of the appeal court to reverse the said discretionary order passed by a competent court within its jurisdiction (see the Division Bench judgment of the Kerala High Court in Premier Plantations Ltd. v. M. Ebrahimkutty [2002] 110 Comp Cas 721 at page 730).

10. For the reasons aforesaid, this Court does not feel inclined to interfere with the order passed by the learned judge and the appeal is therefore dismissed. Consequently, connected miscellaneous petition is also dismissed.

11. No costs.