

(1997) 09 CAL CK 0026
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Original Side A.P.O.T. No. 201 of 1997

Gillette International

APPELLANT

Vs

R.K. Malhotra and Others

RESPONDENT

Date of Decision : 04-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2)
Companies Act, 1956 — Section 10F, 397, 398, 398(2), 402

Citation : (1998) 1 CALLT 371

Hon'ble Judges : Umesh Chandra Banerjee, J; Sidheshwar Narayan, J

Bench : Division Bench

Judgement

U.C. Banerjee, J.

1. The law as regards impleadment of a party has now been settled by a long catena of cases resting with the decision of the Supreme Court in the case of M/s. Aliji Monoji and Co. Vs. Lalji Mavji and others, wherein the Supreme Court in no uncertain terms observed that where the presence of the respondent is necessary for complete and effectual adjudication of the dispute, though no relief is sought, he is a proper party.

2. Turning attention on to the contextual facts, be it noted that in an application under sections 397/398 of the Companies Act, 1956 for relief against oppression, the Company Law Board on a petition filed by the applicant impleaded Gillette International. The order was passed ex parte and without affording an opportunity of hearing to the impleaded party. The contextual facts depict that a recalling application was moved before the Company Law Board and upon hearing, however, the order of impleadment was set aside and subsequently notices were served and the impleadment application was re-heard by the Company Law Board at great length in the presence of Gillette International and the Company Law Board by its order dated 19th February, 1997 passed an order to the following effect :--

"We consider it necessary that M/s. Gillette should be impleaded as a party.

Since a copy of the amended portion of the petition has been already served on M/s. Gillette, they may file their reply to this portion relating to technology by 30th April, 1997 and rejoinder if any, may be filed by 31st May, 1997. In the meanwhile the petition will continue to be heard on dates already fixed. Ordered accordingly."

3. It is this order which is under challenge before this court u/s 10F of the Companies Act, 1956 being a special provision authorising appeals against the orders of the Company Law Board. For convenience's sake, section 10F is set out hereinbelow :--

"Any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order :

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

This narration of section 10F has been effected by reason of a specific plea taken by the respondent as regards the existence of a question of law as noted in the statute itself. Be it recorded that the statute itself is clear and categorical to the effect that it is only a question of law from which an appeal is available to a party against the order of the Company Law Board. Before, however, dealing with the issue as to the question of law, certain factual details ought to be noted at this juncture.

5. The first order of impleadment as directed by the Board has prompted Gillette International to file an application for recalling of the same and in paragraph 7 thereof, it has been stated as follows :--

"7. It is submitted that merely because a proposal regarding possible arrangement for collaboration subject to the requisite approvals of all concerned authorities in accordance with the prevalent policy including the approval of the Company in general meeting, is contemplated cannot Justify the impleadment of the applicant as a party-respondent.

As on date no agreement/proposal regarding supply of technology subsists and no information in that regards is even warranted."

6. The respondent however, in its counter to the application filed by Gillette as noted above stated the following :--

The contents of paras 3, 4, 5, 6 and 7 are wrong and are denied. It is stated that the applicant is a necessary and/or a proper party and in fact in terms of section 402 the applicant has to be impleaded as a party and heard for completely and effectively adjudicating the issues raised in the present petition. It is not necessary that the applicant has to be a member of the company and in control

of affairs of company to be made a party in terms of section 402 of Companies Act, 1956. It is denied that the application has been filed with any ulterior motive and/or to collect information as alleged or at all. It is not admitted that the applicant and respondent company have not entered into an agreement. In any event it is conceivable that the applicant and respondent company are getting approvals without any understanding as to the kind of technology that is going to be transferred. It is stated that no adverse order has been passed against the applicant and it is only in terms of principles of natural justice that before deciding any controversy which will affect the applicant, this Hon"ble Board has sought to implead the applicant and gave it an opportunity of hearing before passing any order. The alleged approvals of various authorities do not take away the power of this Hon"ble Board to decide the issues raised by the petitioners. It is denied that the applicant is liable to be impleaded as party as alleged or at all. The application ought to be dismissed with costs."

7. The records reveal that the Company Law Board observing the pendency of the proceeding directed the company viz.. Harbans Lal Malhotra & Sons Ltd. to file certain documentary evidence pertaining to Gillette's transaction with the company and in so doing. M/s. Khaitan & Co., appearing on behalf of Harbans Lal Malhotra & Sons Ltd. filed several documents, the list of which is set out hereInbelow :--

(1) A letter dated 18th August, 1993 addressed to the Chairman, Foreign Investment Promotion Board, by Gillette International;

(2) Description of machinery;

(3) A letter dated 17th August, 1993 from the Company Harbans Lal Malhotra & Sons Ltd. to the Chairman, Foreign Investment Promotion Board;

(4) A letter from Dua Associates, Advocates appearing on behalf of Gillette International and addressed to the Chairman, Foreign Investment Promotion Board;

(5) A registered letter dated 13th October, 1993 addressed to Gillette International from the Ministry of Industry, Government of India, Department of Industrial Development;

(6) A letter dated 15th October, 1993 from Gillette International to the Government of India Ministry of Industry, Department of Industrial Development; and lastly,

(7) A calendar of events.

8. The particulars furnished above however need a detail reference since the entire thrust of submission of the parties rests on the same. The first document addressed to the Foreign Investment Promotion Board happens to be a proposal regarding developing plans of Gillette for further expansion in India with a specific reference to develop a joint venture by enquiry participation in Harbans

Lal Malhotra with full technical assistance of Gillette in upgrading the production and process technologies of Harbans Lal Malhotra and in introducing new technology products. In paragraph 7 of the proposal, the company sought permission on four specific counts :--

- (I) To acquire upto a maximum of 49% of the equity;
- (II) To grant Harbans Lal Malhotra a licence for the use of Gillette's shaving technology;
- (III) Permission sought for Harbans Lal Malhotra to import blade machinery for FOB value not exceeding \$ 4.3 million; and
- (iv) To grant any and all approvals and permissions required for the attainment of the above.

9. Be it recorded that the third document being a letter from Harbans Lal Malhotra to the Chairman, Foreign Investment Promotion Board, confirms the resolution of the Board of the company approving the foreign investment proposal of Gillette International. Turning attention on to the approval of the Central Government as recorded in the letter dated October, 13, 1993, the proposal for Investment in the equity as also to establish a wholly owned subsidiary in India was accepted subject, however, to certain terms and conditions. The acceptance letter from the Government has categorically recorded that "you may now proceed to finalise the agreement". The factual details, however, would not be complete if we do not mention that the validity as recorded in the document itself was for a period of two years which admittedly has expired and subsequently the term has been extended and the validity has not expired as of date. The other letters as detailed above do not advance the case in any way and as such, we are not detaining ourselves on that score.

10. Turning attention on to the Calendar of events it appears that the same has some relevance as regards the matter in issue and as such the same is set out in extenso hereinbelow :--

26.7.93: Communication from Gillette to HLM putting down their understanding on the basis of which HLM could be prepared to accept their technical and financial collaboration along with a copy of proposed application to Foreign Investment Promotion Board, New Delhi (FIPB).

6.8.97: HLM's Sur-rejoinder in the Company Petition No. 57 of 1992 (R.K. Malhotra & Ors. v. Harbans Lal Malhotra & Sons Ltd. & Ors.) affirmed disclosing the broad terms of the negotiations with Gillette. The same was filed with the Company Law Board on 12.8.93.

17.8.93: Board meeting of HLM held. Broad terms of negotiation as disclosed in the Sur-rejoinder and Gillette's communication dated 26.7.93 were put forth and discussed. Gillette's proposed application to FIPB was approved subject to company's compliance with all necessary legal formalities and obtaining all

requisite approvals including the approval of shareholders. On the same date communications to that effect were issued to Gillette.

19.8.93: Gillette files FIPB application dated 18.8.93 after approved by HLM with FIPB.

23.8.93: Letter from Dua Associates, Advocates for Gillette, to FIPB clarifying the contents of the FIPB application.

13.10.93: Letter dated 13.10.93 issued by Secretariate for Industrial Approvals, New Delhi (SIA) to Gillette approving the foreign collaboration.

15.10.93: Gillette's letter acknowledging to SIA receipt of the approval with further request to make necessary corrections in respect of Royalty, import of Machinery and Equity participation in N.V.I. Engineering Co. Pvt. Ltd.

15.10.93: Foreign Collaboration Agreement between Gillette and HLM recording the broad terms and conditions of their understanding subject to company's compliance with all necessary legal formalities and obtaining all requisite approvals including the approval of shareholders.

11. The Calendar of Events as above, therefore, in no uncertain terms depicts that a Foreign Collaboration Agreement between Gillette and Harbans Lal Malhotra & Sons recording the broad terms and conditions have been entered into though, however, subject to the approval of the shareholders. Whereas Mr. Sen has contended that it would be a mere matter of formality as regards the shareholders' approval, we are not however, inclined to go into the question at this stage neither we are inclined to express any opinion in regard thereto. Be it noted that there is no specific averment in the stay application that the parties have given a go-by to the Collaboration Agreement. The Company "Law Board, however, made the following observations in regard to the Calendar of Events :

"..... This clearly shows the intention of the parties to enter into a collaboration. A formal agreement surfacing once and disappearing at another time cannot be a criteria but the action of the parties in seeking renewal of the Govt. approval shows clearly the intention behind. The various steps taken by both the respondent company and M/s. Gillette and their further pursuit indicates that they are still at it. We could have perhaps draw our conclusions on the nature of technology if this question had been gone into by the Delhi High Court when the FIPB approval was challenged through a writ petition. We now understand that a plea was taken there that the CLB is going into the question of technology and that M/s. Gillette is already impleaded as a party in the CP before us and hence the High Court has left that question to rest there. M/s. Gillette had knowledge of this and hence it would be only appropriate that the nature of technology should be examined by us. As regards the plea that M/s. Gillette is being impleaded as a party instead of being called in as a witness to provide information, the question is not a simple question of the nature of technology alone. The nature of technology is proposed to be examined by us in the context of the submissions

made before FIPB, the agreement already once entered into and, the terms and conditions already put forth for approval by R-I Company's Board etc. In our opinion, all these could be possible only if M/s, Gillette filed detailed affidavits on this issue. In view of the special circumstances of this case the matter falls squarely within the 2nd test as propounded by the Allahabad High Court, we are convinced that we will not be able to pass an effective order on this question in the petition without a proper affidavit from Gillette through impleadment."

12. This observation of the Board has strongly been criticised by Mr. Kapoor appearing in support of the appellant. Mr. Kapoor contended that the intellectual property right of a multi-national company is sought to be affected by reason of disclosure of technology as directed by the Company Law Board. It has been a definite contention of the appellant that the question of examining the nature of technology in any event, assuming there being a Collaboration Agreement, the factum of which has seriously been disputed by the appellant, does not and cannot arise. The proposal has come to Foreign Investment Promotion Board (FIPB) and the Board upon consideration of the relevant materials as regards equity participation as also for establishing a wholly owned subsidiary company in India to act as a holding company in collaboration with the Indian shareholders approved the same though, however, subject to certain conditions. The Company Law Board is otherwise not authorised, the Appellants contended, to go into the same neither the Board has the jurisdiction to order addition of a party who has no connection in the matter pending before the Board. At the outset, Mr. Kapoor's submission seemed to have some substance but on careful scrutiny of the facts relevant for the issue as raised before the appellate court and having due regard to the language of section 397 and 398 of the Act of 1956, we do not find sufficient justification in Mr. Kapoor's criticism as regards the order of the Company Law Board. The language used by the Legislature in no uncertain terms authorise a member of the Company to lodge a complaint as regards the affairs of the company being conducted in a manner prejudicial or oppressive to the interests of the minority and widest possible discretion has been conferred on the Board to pass appropriate orders in the event of such mismanagement amounting to oppression. Sub-section (2) of section 398 of the Act makes the position amply clear and there exists no ambiguity in regard thereto. The words "make such order as it thinks fit" has been introduced by the Legislature to confer on the Board a discretion of widest possible amplitude.

13. The question, therefore, arises as to whether the observation as above of the Company Law Board can be interfered with by the appellate court by reason of the same being totally perverse. It is well settled that the appellate court is not otherwise authorised to intervene or interfere with the exercise of discretion by the Tribunal or lower appellate authority unless the same can be attributed to be so perverse as to warrant intervention of the appellate court. The Board expressly recorded that it will not be able to pass an effective order on the question in issue in the absence of Gillette or unless Gillette is added as a party by way of impleadment. The matter in issue before the Board pertains to affairs

of Harbans Lal Malhotra & Sons and a definite case has been made out that the affairs and conduct of the Company has gone in such a way so as to create prejudice to the interest of the minority group of share-holders and in the event the minority group comes up before the Board and informs that there is existing a Collaboration Agreement or likelihood of there being a Collaboration Agreement which would undoubtedly prejudice the interest of the Company, in our view, question of declaring the order of impleament as perverse does not and cannot arise. The Board in its opinion, though may or may not be so considered by the High Court, thought it fit to implead the multinational company as a party to the proceeding and to examine whether the Company's effort for equity participation with foreign collaborator can be justified or not, cannot in our view be decried by the Appellate Court as being perverse. In the factual matrix of the matter under consideration question of infringement of intellectual property right of the multinational company does not and cannot arise. Incidentally be it noted that in a Civil Suit being Suit No. 873 of 1994 filed before the High Court at Delhi in its Ordinary Original Jurisdiction, the Plaintiff being Gillette International has prayed for a decree for permanent injunction restraining the defendants Harbans Lal Malhotra & Sons from infringing Gillette's patent rights registered in this country bearing Nos. 134949, 134950, 134951 and 136138--all dated March 15, 1972, The defendant being Harbans Lal Malhotra in the suit before the Delhi High Court in the Written Statement stated :

... .. The plaintiff by fair means or foul have systematically and methodically destroyed all their competitors all over the world. It is well known in the business circle that it was the policy of the plaintiff that it would not associate with any company for the purpose of production of blades and that it was only interested in wholly owned subsidiaries in foreign countries."

14. This stand of the Company has been given a complete go-by and in fact in 1993 a Collaboration Agreement was entered into as noted above in the Calendar of Events. It is on this factual context if the Company Law Board feels it expedient to assess the situation itself, would the appellate court be justified in negating such a desire of the Board--the answer cannot but be in the negative. While it is true that Order 1 Rule 10 of the Code though strictly cannot be said to be applicable in a proceeding before the Company Law Board but the principles analogous thereto has been adopted by the Board for proper and effective adjudication of the disputes between the parties pending before the Board. In our view, however, no exception can be taken in regard thereto and the discretion used by the Board cannot by any stretch be termed to be perverse so as to warrant Intervention of the appellate court, more so by reason of the express provisions of sections 397 and 398 of the Act of 1956.

15. The other aspect of the matter as has been referred to by Mr. Kapoor in support of the appeal is in regard to section 402 of the Act of 1956. It has been contended that the Legislature thought it fit to provide the specific powers to the Board without prejudice to the generality of the powers in sections 397 and 398

of the Act. As a matter of fact Mr. Kapoor contended that in fact there has been an unbuilt and adequate statutory safeguard as contained in section 402(e) of the Act and in the event the Board deems it expedient, the Board would otherwise be authorised in terms of the provisions of the Statute to terminate the Agreement, if there be any. On the wake of such a provision, user of discretion cannot but be said to be perverse by reason of Incorporation of such provision. We are, however, unable to appreciate the contentions advanced by Mr. Kapoor and there exist more reasons than one to allay such an apprehension. Turning attention onto factual context at this Juncture firefly once again it appears that the Board recorded that without impleadment of Gillette, it would be an impossibility to deal with the grievance of the petitioner effectively. It is not that the Board is oblivious of such a statutory provision since the Board itself records :--

" Yet keeping view the specific provisions of section 402(e) we shall provide adequate separate opportunity to measure Gillette if and when we come to any conclusion that there is need for termination or modification of the agreement, if any, in force. We shall not give a go-bye to the specific statutory procedure as apprehended by Sri Vellapally."

16. The same apprehension as noted above, has also been expressed before us by Mr. Kapoor although in a different tune to the effect however that on the wake of specific provision there is existing ample safeguard to the minority group, since the Agreement, if the situation so demands, can be terminated or modified if the Board deem it fit and expedient and in that event the question of any implement by user of discretion does not arise. We are afraid, Mr. Kapoor's apprehension cannot be sustained and the question of termination of the agreement does not and cannot arise. The Board itself opines that in the event there is a need for termination or modification of the agreement, if any, the Board would provide adequate opportunity. But the Board is desirous of knowing as to whether there is any prejudicial effect on the minority in the event of there being a Collaboration Agreement. In our view, in the contextual facts, section 402 cannot be taken recourse to so as to avoid an order of impleadment. In any event. Order 1 Rule 10(2) of the CPC provides that court may at any stage of the proceeding, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether plaintiff or defendant, be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. The second limb of sub-rule (2) of Order 1 Rule 10 of the Code confers the widest possible discretion upon the court, if the court otherwise deems it expedient for the purpose of effective adjudication that addition of a party is required. In our view, that is the end of the chapter and we need not proceed further in the matter on the wake of such a requirement of law. It is true, as noted above, that the CPC in its strictest terms

will not apply as such, before the Company Law Board but the same can be taken recourse to in order to avoid any procedural lapses having due regard to the concept of justice. The decision of the Supreme Court in the case of New Redbank Tea Co. Pvt. Ltd. Vs. Kumkum Mittal and Others, in our view, in the contextual facts does not have any manner of application and reliance thereon is totally misplaced. The facts in the New Red Bank Tea Ltd.'s case (supra) depict that the respondent No. 11 admittedly had a legal interest in the subject matter of the suit and all that the respondent No. 11 claimed was specific performance of the agreement for sale of Dharanlpur Tea Estate Co. The reliefs claimed by the plaintiffs relate to validity of the agreement whereby the plaintiffs in that suit had transferred their controlling share in the appellant Nos. 1 and 2 in favour of appellant No.3 and its group for valuable consideration. The facts further depict that there was in fact a suit filed by the respondent No. 11 relating to specific performance of an agreement as regards the sale of Dharanlpur Tea Estate by Dharendra Nath Bhowmick and the respondent No. 7 and as such the respondent No. 11 cannot be said to be directly interested in the matter of validity of the agreement executed by Dharendra Nath Bhowmick and the respondent No. 3 and it is on that factual context that the Supreme Court came to the conclusion that the question of declaring the presence of respondent No. 11 as necessary for effectual and complete adjudication does not arise. The further factum of the suits being tried together had also weighed with the Supreme Court in coming to the conclusion as regards the impleadment of respondent No. 11 in the Suit of 1985, as held in the New Red Bank Tea Company's case. The decision of the English Court, however, in the case of Moser v. Marsden (1892) 1 Ch. 487, does not run counter to the observations of this court as noted above. The Company Law Board thought it fit to record that the presence of Gillette is required for the purpose of effective adjudication of the dispute between the parties in the interest of justice and not merely as a witness only. The factum of the Collaboration Agreement in 1993; the approval of FIPB subsequent application for extension and subsequent order for grant of extension are all relevant in the circumstances which the Board took into consideration in coming to the conclusion that the presence of Gillette is required for effective adjudication of the dispute. We are not in a position, therefore, to lend our concurrence to the submissions of Mr. Kapoor that the same suffers from the vice of perversity. The issue has to be considered as to whether the Board feels, that the latter cannot decide the question without the presence of the party. If that be the state, the party ought to be added so as not to defeat the action and such addition of party is all the more necessary to deal with the matter in its proper spirit and intent and in its entirety, as the Statute has demanded.

17. The other factual aspect of the matter ought also not to be lost sight of and should be dealt with at this juncture, to wit, the aspect of fairness with which the Board has acted. There was an ex parte order of impleadment and by reason of an application by Gillette, the order was immediately recalled and the matter was given full hearing subsequently. As noted above, upon consideration of the

relevant facts, the Board ultimately came to conclusion that for effectual and complete disposal of the matter the presence of Gillette is required. There is no lack of sincerity on the part of the Board neither there is any lack of opportunity of hearing. The Board has duly recorded the submissions of the parties and came to the conclusion for impleadment. We do not think that the same suffers from the vice of perversity so as to warrant intervention of the appellate court.

18. Before we conclude, however, the submission of Mr. Sen as regards the question of appeal ability by reason of express language as embodied in section 10F of the Act ought to be noticed. Mr. Sen has strenuously urged that the question of entertaining the appeal does not and cannot arise since addition of party cannot by any stretch be termed to be a question of law and such the language used by the legislature, to wit "any question of law" makes the position amply clear and that it is on the question of law only that the appellate jurisdiction, as conferred by the Statute, on the High Court, be exercised. Again at the first blush the point seems to be well taken but on careful scrutiny of the materials on record and considering the order of the Company Law Board and the submissions made on the basis thereof, we are, however, unable to lend our concurrence to the submissions of Mr. Sen since we are of the view that the point as to the addition of party--a legal fact--is a question of law and, in any event, to determine whether an order of the Board would entail the question of law, the court must consider the order as a whole and in the event of there being at least an arguable case, the same will come within the ambit of section 10F. The statutory language ought to be given its proper meaning and in our view restricted meaning would defeat the purpose and concept of justice. As such the contention of Mr. Sen in regard to the issue of appealability u/s 10F falls.

In the view above, this appeal fails and is thus dismissed without, however, any order as to costs.

19. Appeal dismissed