

(2009) 08 DEL CK 0271

In the Delhi High Court

Case No : CS (OS) 2011 of 2008 and IAs 11686, 11687, 12820, 12822 and 12823 of 2008

HB Stockholdings Ltd.

APPELLANT

Vs

DCM Shriram Industries Ltd. and Others

RESPONDENT

Date of Decision : 25-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151, 9
Companies Act, 1956 — Section 155, 192A, 209, 210, 211
Securities and Exchange Board of India Act, 1992 — Section 15Y
Specific Relief Act, 1963 — Section 34, 41

Citation : (2010) 156 CompCas 54 : (2010) 1 CompLJ 379 : (2009) 163 DLT 443 : (2010) 7 RCR(Civil) 2142

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Anant Haksar and H.S. Chandhoke, for the Appellant; T.K. Ganju Ramesh Singh, A.T. Patra, A. Patra and Roopa Dayal for D-1 to 13 and I. Ghosh and Sandeep Mahapatra for D-14, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.

IA No. 12820/2008

1. This is an application under Order VII Rule 11 read with Section 151 of the CPC 1908 ("CPC") seeking rejection of the plaint.

The case of the plaintiff

2. The plaintiff H.B. Stockholdings Limited ("HBSL") claims to hold 24.8% of expanded issued and paid-up capital of DCM Shriram Industries Limited ("DSIL"), Defendant No. 1 and thereby being its single largest shareholder. On 22nd September 2008, the plaintiff received the Annual Report and audited accounts of DSIL for the year ending 31st March 2008, which had been approved

by the Board of Directors of DSIL on 25th June 2008. According to the plaintiff, the Annual Report and audited accounts revealed that they were "grossly inaccurate and/or lacking in several material particulars" and "do not reflect a true and fair view of the Company's affairs, apart from being in violation of the provisions of the Companies Act, 1956 ("Act"), the provisions of the Listing Agreement with the Bombay Stock Exchange (BSE) and the Company's own Code of Business Conduct and Ethics." It is claimed that these constituted "unjust and unlawful acts of the Defendants" which were likely to "cause irreparable harm and injury not only to the plaintiff but also to over one lakh other shareholders of the Defendant No. 1 company."

3. Tracing the background to the present suit, it is stated in the plaint that Versa Trading Limited ("VTL") was a wholly owned subsidiary of DSIL. In September 2002, DSIL sold 50.02% of its shareholding in VTL at 10 paise per share against its acquisition price of Rs. 10/- per share to three entities viz., AKS International Limited (AIL), RPG Securities Limited (RSL) and Indus Netlink Limited (INL). However, a perusal of the Annual Reports of these three companies for the year ending 31st March 2006 did not reflect any investment in VTL. It had, therefore, to be inferred that the three companies were benami holders of the said shares. The balance 49.98% shares held by DSIL in VTL were claimed to have been sold in 2007-08 but the price at which they were sold was not known. According to the plaintiff, it was strange that DSIL would sell its shareholding in VTL when it knew that more than Rs. 18 crores would be raised by VTL itself for investment in DSIL. Moreover, VTL owed DSIL about Rs. 7.8 crores as on 31st March 2007. Out of this debt, a sum of Rs. 7 crores was converted into redeemable non-cumulative preference shares. However, the Directors' Report dated 30th July 2007 of DSIL as well as of VTL did not reflect any increase in the authorized capital of VTL. They also made no mention of the issuance of any preference shares in lieu of the debt owed by VTL to DSIL. It is stated that VTL could not have possibly invested Rs. 18.63 crores in DSIL instead of repaying the debt. DSIL's balance sheet showed that DSIL had made a 100% provision for the Rs. 7 crores invested in VTL.

4. According to the plaintiff, the Annual Return of VTL dated 30th August 2007 filed with the Registrar of Companies ("ROC") did not reflect the increase in the share capital or the issuance of preference shares to DSIL. The shareholding pattern in terms of the Annual Return showed that DSIL held 49.98% shares, and the three companies AIL, RSL and INL 16.67%, 16.67% and 16.68% shares respectively. The six individuals shown as the remaining shareholders of VTL were either DSIL's or VTL's employees. As already mentioned in the Annual Returns of the three companies i.e AIL, RSL and INL for the years ending 31st March 2006 and 31st March 2007, their investment in VTL was not shown. The Auditors' Report of VTL for the year ending 31st March 2007 showed that VTL had accumulated losses exceeding the company's share capital, and yet it was investing Rs. 18.63 crores in DSIL.

5. According to the plaintiff, although DSIL itself had not indicated how and to whom it had sold the remaining 49.98% shares held by it in VTL, enquiries revealed that they were sold to DCM Hyundai Limited ("DHL"). Also AIL, RSL and INL sold their 50.02% shares in VTL to DHL.

6. On 16th October 2007, a resolution was passed by the Board of Directors of DSIL by which 7 lakh share warrants were to be issued to the Promoters/Promoter Group companies including VTL. 6.99 lakh warrants in the sum of Rs. 18.63 crores were allotted to VTL. This despite the fact that VTL had a negative net worth and was prohibited by the Reserve Bank of India ("RBI") by an order dated 24th November 2001 from transacting the business of a non-banking financial institution. Also, VTL was not authorized by its Memorandum and Articles of Association to make such investments. The minutes of the meeting of the Board further show that rights issue was never discussed in detail and Letters of Intent had been received by the proposed allottees including VTL.

7. On 18th October 2007, a notice was sent to the shareholders of DSIL u/s 192A of the Act stating that the purpose of the preferential issue was to raise funds for working capital purposes and supplementing bank finance. The notice did not state the number of warrants to be allotted to each of the six proposed entities. The amount proposed to be raised in terms of the notice was approximately Rs. 12 crores, spread over the next 18 months.

8. On 15th November 2007, VTL passed three resolutions at an Extraordinary General Meeting (EGM): (a) to increase its authorized capital to Rs. 32 crores; (b) to issue and allot 2 crore equity shares of Rs. 10 each to DHL which was now suddenly referred to as its Holding Company; and (c) to obtain the approval of shareholders u/s 372A(1) of the Act for the purpose of making an investment of Rs. 18.63 crores for subscribing to 6.9 lakh warrants at Rs. 90/- per share issued by DSIL. Thus, as on 16th October 2007 the Letter of Intent by VTL to DSIL to subscribe to the proposed issue of warrants was without authority and hence void. According to DSIL itself, the price of the warrants was revised only on 21st November 2007 from Rs. 57/- per share (set on 8th November 2007) to Rs. 90/- per share. It was therefore strange that VTL would have offered to subscribe to warrants at Rs. 90/- per share on 15th November 2007 when the DSIL's Board meeting determined this price only on 21st November 2007.

9. In order to consolidate its shareholding, HBSL made a public announcement on 19th November 2007 under Regulations 10 and 14 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (SEBI Takeover Code) for acquisition of 35 lakhs equity shares of DSIL.

10. According to the plaintiff, due to various acts of oppression and mismanagement perpetrated by the promoters and directors of DSIL, the HBSL was constrained to approach the Company Law Board ("CLB") with a petition under Sections 397 and 398 of the Act. In the said petition, which is pending adjudication, it was inter alia mentioned by the plaintiff that on 29th November

2007, it had written a letter to DSIL urging it to go in for a rights issue and even offering to have the same underwritten. The plaintiff had further made an offer of subscribing to the warrants proposed to be issued at a price of Rs. 120/- per share rather than the price of Rs. 90/- per share that had been proposed. However, the said letter was completely ignored and warrants allotted to the six entities. It is stated that DSIL had raised Rs. 18.9 crores by the allotment of shares although it required only Rs. 12 crores. Further the actual receipt of moneys of Rs. 18.9 crores was not evidenced except for the certificate given by Defendant No. 14 A.G. Ferguson & Co. No information was given as to the utilization of the moneys allegedly raised for the payment of cane arrears. The plaintiff also stated that it had come to know that DSIL had raised Rs. 87.752 crores from the Sugar Development Fund and a consortium of Banks between April 2007 and April 2008 of which Rs. 45.752 crores was specifically earmarked for the purpose of payment and sugarcane arrears. Therefore, the reason given for raising funds through allotment of shares was apparently false. It is submitted by the plaintiff that reasons given by DSIL for raising funds has kept changing from time to time. It is further pointed out that although the shares were to be allotted in three tranches, DSIL issued the entire shares by 1st April 2008. Further, 20.7 lakhs shares were allotted to VTL.

11. On 26th March 2008, a resolution was passed by the Board of Directors of VTL stating that it was now a wholly owned subsidiary of DHL which had proposed to extend its financial year by six months i.e. ending on 30th September 2008 and, therefore, it was now extending its financial year likewise.

12. As regards DHL enquiries revealed that DSIL held 49.28% shareholding in DHL plus 100% of optionally convertible preference shares amounting to Rs. 12.85 crores. Moreover, the Articles of Association of DHL gave substantial control to DSIL over the management and composition of its Board of Directors. The pattern and composition of the Board of Directors of DHL revealed that the DHL is in fact a subsidiary of DSIL. Further, DHL had pledged all its movable and immovable properties to DSIL which had in turn undertaken to repay all DHL's loans to banks and financial institutions. However this had not been reflected in the accounts of DSIL.

13. DHL has been a loss making company since 1995 and it had been declared "sick" by the Board for Industrial and Financial Reconstruction ("BIFR") on 28th July 1998. It is currently under a scheme of rehabilitation which had been sanctioned by the BIFR in 2007. According to the report of the Board of Directors of DHL, DSIL had written-off loans of over Rs. 75 crores of DHL. The plaintiff has sought to explain how DSIL first financed VTL and DHL and then wrote off crores of dues from both these companies thereby depleting the shareholder value of DSIL. Notwithstanding the write offs, both these companies still owed DSIL several crores of outstanding dues. Instead of paying off these dues, DHL purportedly bought 49.98% shareholding of DSIL in VTL and the 50.02% shareholding from the three benami entities. DHL further gave VTL Rs. 20 crores

to subscribe to warrants issued by DSIL, while DHL itself was under a Scheme of Rehabilitation sanctioned by the BIFR. On its part, VTL, while still owing money to DSIL, instead of repaying those dues, subscribed to 6.9 lakh warrants allotted by DSIL, which formed part of the promoter holding of DSIL. According to the plaintiff, the above facts demonstrated that the Defendants had siphoned off the funds of DSIL to the detriment of the shareholders of DSIL by borrowings from banks and using them to fund DHL. These acts were detrimental to the interests of the shareholders of DSIL. It is further pointed out that since DHL was a sick company it could not have possibly raised funds on its own.

14. It is stated that that none of the above facts have been reflected in the Annual Report of DSIL. The plaint acknowledges that there is pending litigation before the CLB, this Court and the Securities Appellate Tribunal ("SAT") in which the DSIL had been bearing the cost of litigation initiated/defended by it. However, the promoters of DSIL have been benefited by the fraud and it is solely at their behest and for their benefit that the litigation was being carried out in the name of DSIL. According to the plaintiff, the Auditors (Defendant No. 14) of DSIL had also committed a breach of the provisions of the Act by failing to report the above position in their Report. The plaintiff alleges that there is a breach of fiduciary duty cast on the Board of Directors and the individual directors have been arrayed as Defendant Nos. 2 to 11. In para 14 of the plaint, numerous irregularities in the Annual Report and the Accounts have been set out. According to the plaintiff, the Defendants had violated Sections 209 to 211, 215, 217, 219 and 227 of the Companies Act, 1956 and "several provisions of the Listing Agreement with the Bombay Stock Exchange including but not limited to Clause 32, Clause 41, and Clause 49."

15. In para 19 of the plaint, it is stated as under:

19. The plaintiffs are agitating issues with regard to mismanagement and oppression of the minority before the Hon.ble Company Law Board, and on issues with regard to the violation of the SEBI Act and Regulations before the Hon.ble Securities Appellate Tribunal. The reliefs claimed in this suit have not been claimed elsewhere and are solely within the jurisdiction of this Hon.ble Court.

16. On the basis of the above pleadings the following reliefs are sought in the suit:

(a) Pass a decree in favour of the plaintiff and against the Defendants, declaring the Annual Report of the Defendant No. 1 along with the Accounts, the Directors Report, the Auditors Report and annexures thereto, for the year ending 31.03.2008 as currently circulated to the shareholders after approval by the Defendants on 25th June 2008, as null and non est and the same be treated as cancelled.

(b) Pass a decree of mandatory injunction directing appointment of an independent and qualified Chartered Accountant to carry out a fresh audit of the

books of account of the Defendant No. 1 company and the Defendants to provide the shareholders with the true and fair state of affairs by circulating for the shareholders approval in a duly constituted shareholders meeting, a fresh Annual Report and Accounts prepared in accordance with the provisions of law;

(c) pass a decree of permanent injunction in favour of the plaintiff, restraining the Defendants, their respective officers, agents, etc from passing proposed Resolution No. 1 (to adopt the Directors Report, the Audited Balance Sheet and the Profit & Loss), Resolution No. 3 (Re-appointment of Mr. Madhav Shriram as a Director), and Resolution No. 6 (to reappoint M/s. A.P. Ferguson & Co. as the auditors of the Company), as stated in the Notice for the AGM dated 25th June 2008, in the Annual General Meeting proposed to be held on 25th September 2008;

(d) Pass a decree of permanent injunction in favour of the plaintiff, restraining the Defendants their respective officers, agents, etc. from acting upon or giving effect to the Annual Report and Audited Accounts as approved by the Defendants on 25th June 2008 for the year ending 31st March 2008, and upon the proposed Resolutions No. 1, 3 and 6; and

(e) grant costs in favour of the plaintiff and against the Defendants.

17. Along with the suit, the plaintiff also filed IA No. 11686 of 2008 under Order XXXIX Rules 1 and 2 read with Section 151 of CPC in which prayer was made for an ad interim injunction to restrain the defendants from proposing or passing the resolution adopting or from giving effect to the Annual Report and Audited Accounts for the year ending 31st March 2008 at the Annual General Meeting (AGM) proposed to be held on 25th September 2008 and for a direction for a fresh audit of the books of account of DSIL to be carried out by an independent and qualified Chartered Accountant.

18. On 23rd September 2008, this Court directed summons to issue in the suit and notice in the aforementioned application. However, no interim injunction was granted since it was felt that if the resolution in question were stayed, irreparable injury could be caused to DSIL. The court took note of the contention of learned Senior counsel for Defendant No. 1 who appeared on caveat and pointed out that similar points were urged by the plaintiff before the CLB and before SEBI/SAT but without success.

19. After the AGM was held on 25th September 2008 and the resolution in question passed, the plaintiff filed IA No. 12823 of 2008 under Order VI Rule 17 CPC for amending the plaint to challenge the said decision. Meanwhile, the Defendant DSIL had filed IA No. 12820 of 2008 under Order VII Rule 11 CPC. Application IA No. 12822 of 2008 was filed by Defendant No. 1 DSIL for suspending the time for filing the written statement. Along with the plaint, the plaintiff also filed IA No. 11687 of 2008 under Order II Rule 2 CPC seeking leave to sue for in respect of any other cause of action that may arise after the assessment and investigation of the damage caused to DSIL and in the event of

any misappropriation being discovered subsequently.

20. Defendant No. 11 did not appear despite service. No written statement was filed in the suit by the other defendants. Pleadings were complete in IA No. 12820 of 2008 under Order VII Rule 11 CPC, which, with the consent of parties, was heard finally.

The case of the Defendant

21. The contentions of DSIL in the said application under Order VII Rule 11 CPC are as follows:

(a) The allegations in the suit were really in the nature of oppression and mismanagement for which a remedy was provided under the Act. Alternatively, the alleged violations were of the provisions of Securities & Exchange Board of India Act, 1992 ("SEBI Act") and the Regulations framed there under. Therefore alternate/efficacious remedies were available to the plaintiff either before the CLB or before the SEBI and the Securities Appellate Tribunal (SAT). It is submitted that the jurisdiction of the civil court is barred in view of Section 9 CPC read with Section 41(h) of the Specific Relief Act 1963 ("SRA") and Section 15Y of the SEBI Act.

(b) The very grievance raised in the present suit is already the subject matter of proceedings before the CLB, SEBI and SAT. Therefore, the present suit was case of forum shopping particularly since no interim relief was granted to the plaintiff by the CLB and SEBI. The suit is also therefore an abuse of the process of the court.

(c) The suit was a personal action brought about by a single shareholder against the manner of preparation of company's accounts. In any event none of the other shareholders had made complaint about the alleged lack of proper notice/particulars/disclosures in the Annual Accounts and Auditors Report. The decision of the majority of the shareholders had to prevail.

(d) The present suit insofar as seeks the removal of Defendant No. 14 as an Auditor is barred since there is specific procedure outlined in Section 225 of the Act for removal or appointment of an Auditor. That cannot be short circuited by resorting to a civil suit.

(e) At the AGM held on 25th September 2008 the plaintiff was represented by Mr. Anil K. Mittal who demanded poll on several items on the agenda. Poll was accordingly taken on the following day i.e. 26th September 2008. The result thereof was announced by the Chairman based on the scrutinizer's report. All the seven agenda items were passed with more than the requisite votes. Since the plaintiff had participated in the said meeting it should be deemed to have abandoned the present proceedings and therefore the cause of action leading to the filing of the present suit did not survive any more.

(f) Towards implementation of the said resolutions, copy of balance sheet, profit

and loss account and related documents were filed with ROC at New Delhi and they were taken on record by the said office. The Annual Report has also been uploaded on SEBI's web-site on 29th September 2008 in terms of the Listing Agreement. Reappointments/ appointments of the Directors have also been given effect to by filing the statutory Form 32 with the ROC. Minutes of meeting have been also sent to the BSE on 3rd October 2008. It is submitted that in view of the above developments the cause of action had disappeared.

Accordingly it is prayed that the plaint must be rejected.

The plaintiff's reply

22. In its reply to the IA under Order VII Rule 11 CPC, the plaintiff submitted that in view of the subsequent developments, the application had become infructuous. It is further submitted that the ground on which the DSIL seeks rejection of the plaint is not one of the grounds enumerated under Order VII Rule 11 CPC. It is submitted that the reference to Section 41(h) SRA is misplaced. It is further submitted that the challenge to the audited accounts adopted by the DSIL for the financial year ending 2007-2008 is not the subject matter of any other petition before the CLB or SEBI/SAT and, therefore, the present civil suit is maintainable. Merely on account of the commonality of the background facts leading up to the present suit, it could not be concluded that the issues involved in the suit were common to the proceedings before the CLB or the SAT. The issues in this suit are distinct and separate. It is urged that violations complained of and the reliefs claimed in the suit have not been urged or claimed by the plaintiff before any other forum. It is stated that there is no provision of law pointed out by DSIL according to which a single individual shareholder cannot maintain a suit against a company. The mere approval of the annual accounts at the AGM of DSIL cannot render the suit infructuous since a shareholder cannot possibly give consent to an act that is in violation of the law.

Submissions of Counsel

23. Mr. Anant Haksar, Senior counsel appearing for the plaintiff/non- applicant in IA No. 12820 of 2008 submits that the question to be addressed first was whether in terms of Section 9 CPC there was an express or an implied bar to this Court entertaining the suit? Secondly, whether Section 41(h), SRA constituted a bar to the maintainability of the suit? Thirdly, whether a suit seeking the relief of a bare declaration without a consequential relief of injunction can be maintainable?

24. It is submitted by Mr. Haksar that Section 41(h) SRA is only a bar to the court granting an injunction in a given context. It does not bar the maintainability of the suit itself. In any event, the relief concerning the removal of the auditor has not been claimed by the plaintiff before CLB or the SAT and, therefore, not hit by Section 41(h) SRA. Further, notwithstanding Section 34 SRA, the common law remedy is not taken away. It is submitted that none of the grounds on which the Defendants seek rejection of the plaint are spelt out in

Order VII Rule 11 CPC. It is submitted that this is not a case where there is no disclosure of cause of action, or where the plaint contains a statement whereby the suit appears to be barred by any law. As regards the proceedings before the SAT, it is submitted that the reliefs sought before that authority are different from those sought in the petition before the CLB and in the present suit. The proceedings before the SAT primarily concern the violation of the SEBI Takeover Code. It is therefore submitted that Section 15 Y SEBI Act does not bar the present suit. Reference has been made to a large number of decisions including CDS Financial Services (Mauritius) Limited v. BPL Communications Limited [2004] 121 CC 374 (Bom), Jaypee Cement Ltd., in re. [2004] 62 CLA 329 (All.), Spices Valley Estate Ltd. Vs. TC Forexpress Ltd., (Formerly known as Synergy Forexpress Ltd.), Pradip Kumar Sarkar v. Luxmi Tea Co. Limited (1990) Vol. 67 491 (Cal), Dr. T.M. Paul v. City Hospital (Pvt.) Limited [1999] 97 CC 216, Shonkh Technologies Limited v. Union of India (2008) 85 CLA 351 (Del), Smt. Premvati and Others Vs. Smt. Bhagwati Devi and Others, Popat and Kotecha Property Vs. State Bank of India Staff Association, , Wasudhir Foundation Vs. C. Lal and Sons, Suraj Bhan Anil Kumar and Another Vs. Molu Ram Kapoor Chand, Gaganmal Ramchand Vs. The Hongkong and Shanghai Banking Corporation, Harl Bhagwan Sharma and Others Vs. Badri Bhagat Jhandewalan Temple Society and Others, Transcore Vs. Union of India (UOI) and Another, Kasthuri, Sukanyalakshmi, Subathradevi, Saroja and Padmavathy Vs. Baskaran and K. Selvaraj, and Ramaswamy Palledar Vs. Secretary to the Government of NCT of Delhi and another,

25. Mr. T.K. Ganju, learned Senior counsel refers to Sections 397, 398 and 402 of the Act and contends that powers of the CLB are wide enough to grant any of the reliefs sought for in the suit. According to him, once the plaintiff has elected to go before the CLB with a petition complaining of oppression and mismanagement, it cannot be permitted to go from one forum to another with the same set of grievances till such time it gets relief. That would clearly constitute forum shopping which is impermissible in law. He hands over a chart showing the comparison of the averments made in the suit, in the petition before the CLB and in the petition before the SEBI/SAT and points out to the commonalities of the averments.

26. It is further pointed out that after the filing of suit, the plaintiff has sought to amend its petition before the CLB. Although not termed formally as an amendment application, it is described as an application "for placing on record additional and subsequent facts, documents and ground along with supporting affidavit." Referring to Section 41(h) SRA, it is submitted that inasmuch as the Court cannot possibly grant the relief of injunction, the suit would be only for a bare declaration which is barred u/s 34 SRA. It is pointed out that even in the amendment application under Order VI Rule 17 CPC, the reliefs for a consequential injunction have not been sought to be deleted. By an oral statement at the bar, the plaintiff cannot seek to restrict the relief being sought for in the suit. It is submitted that suit is also bad for misjoinder of parties.

27. It is submitted that the test is really whether the relief being sought in the suit is expressly or impliedly barred by law. There is a clear bar in terms of the Act to "entertaining" the suit for the same relief as is sought before the CLB. It is submitted that after the enactment of the Act and, in particular, Sections 397, 398 and 402 thereof the relief against oppression and mismanagement can no longer be termed as a common law right. It is contended that there is an express bar to claiming the relief of removal of the auditor without following the procedure u/s 225 of the Act.

28. Mr. Ganju, learned Senior counsel refers to the various decisions including *Anil Gupta v. J.K. Gupta* 2002 (110) CC 610 (P&H), *Kamal Kumar Dutta and Another Vs. Ruby General Hospital Ltd. and Others*, , *Khetan Industries Pvt. Ltd. and others Vs. Manju Ravindraprasad Khetan*, Bombay 43, *Bennet Coleman and Co. v. Union of India* 1997 (47) CC 92 M/S. *Ammonia Supplies Corporation (P) Ltd. Vs. M/S. Modern Plastic Containers Pvt. Ltd. and Others*, *Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others*, *Manohar Lal Chatrath and Another Vs. M.C.D., Reckit Benckiser (India) Limited Vs. Naga Limited and Others*, , *Priyanka Vivek Batra Vs. Neeru Malik and Others*, , *Reckitt Benckiser (India) Ltd. Vs. Hindustan Lever Limited*, , *Amar Nath Malhotra v. MCS Limited* (1993) 76 CC 469, *Vijay M. Shah v. Flex Industries* 2001 (103) CC 1063, *Hind Samachar Limited and Others Vs. Indian Newspaper Society and Another*, *Eternit Everest Ltd. Vs. Neelmani Bhartiya, Raja Ram Kumar Bhargava (Dead) by Lrs. Vs. Union of India (UOI)*, *Punjab State Electricity Board and Another Vs. Ashwani Kumar, Transcore Vs. Union of India (UOI) and Another*, , *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*,

Implied or express bar u/s 9, CPC

29. One of the questions to be considered is whether there is any implied or express bar to the maintainability of the suit. Section 9 of the Code of Civil Procedure, 1908 states that the civil court shall have jurisdiction to try all suits of a civil nature "excepting suits of which their cognizance is either expressly or impliedly barred."

30. For the purpose of examining the above question, the court is accepting as correct the averments in the plaint as originally filed. For the sake of completeness, although the application for amendment has not yet been allowed, this Court has also kept in purview the plaint as sought to be amended. According to the plaintiff, the annual accounts and the Annual Report of DSIL for the year 2007-08 suffers from numerous irregularities. A declaration to that effect is being sought in the suit. Consequently, the relief of injuncting DSIL from adopting the Annual Report and annual accounts has been sought. The amendment sought to be carried out to the plaint is a result of the adoption of certain resolutions at the AGM of the DSIL which took place on 26th September 2008. The amendments, if allowed, would add to the prayers in the suit to seek a declaration that the resolutions passed at the AGM/Poll held on 25th September 2008/26th September 2008 would be null, void and non est. The amendment

does not seek to delete the mandatory injunction originally sought directing the appointment of an independent Chartered Accountant to carry out a fresh audit of the books of account of DSIL. Further the prayer of removal of the auditor (Defendant No. 14) as auditor of DSIL and directing the appointment of another auditor in place thereof also remains. In effect, the suit even after the proposed amendments continues to be one seeking the relief of declaration and consequential injunction.

31. The question is whether the suit framed as such is impliedly barred? According to the Defendants, the plaintiff has already elected to go before two other fora - the CLB and the SAT. Pending before the CLB is a petition filed by the plaintiff complaining of oppression and mismanagement within the meaning of the Act. The provisions of that Act and in particular Sections 397 and 398 have been held to be a complete code. The question whether the issues arising out of the management of the affairs of a company can be adjudicated in a civil suit and whether such suit is impliedly barred in view of the remedy available under the Act, has come up before the courts earlier.

32. In *Bennet Coleman & Co. v. Union of India* (supra) the Division Bench of the Bombay High Court explained the scope and ambit of Chapter VI of the Act which includes Sections 397, 398 and 402 of the Act. In drawing a distinction between the powers of the Central Government under Chapter IV A of the Act and powers of the Court under Chapter VI (later these powers of the Court were vested in the CLB), the Bombay High Court held as under:

...It is in view of this scheme which is very apparent on a fair reading of the arrangement of chapters and the Sections contained in each chapter which are all grouped under Part VI of the Act that the question will have to be answered as to whether the powers of the court under Chapter VI (which includes Sections 397, 398 and 402) should be read as subject to the provisions contained in the other chapters which deal with normal corporate management of a company and, in our view, in the context of this scheme having regard to the object that is sought to be achieved by Sections 397 and 398 read with Section 402, the powers of the court thereunder cannot be so read. Further, an analysis of the Sections contained in Chapter VI of Part VI of the Act will also indicate that the powers of the court u/s 397 or 398 read with Section 402 cannot be read as being subject to the other provisions contained in Sections dealing with usual corporate management of a company in normal circumstances. As stated earlier, Chapter VI deals with the prevention of oppression and mismanagement and the provisions therein have been divided under two heads --under head A powers have been conferred upon the court to deal with cases of oppression and mismanagement in a company falling under Sections 397 and 398 of the Act while under head B similar powers have been given to the Central Government to deal with cases of oppression and mismanagement in a company but it will be clear that some limitations have been placed on the Government's powers while there are no limitations or restrictions on the court's powers 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. In other words, whenever the legislature wanted to do so it has made a distinction between powers conferred on the Government (vide Section 408) and powers conferred on the court (vide Section 402} while dealing with similar emergent situations or extraordinary circumstances arising in the management of a company and in the case of the Government it has placed restrictions or limitations on the Government's powers but no restrictions or limitations of anything have been prescribed on the court's powers.

33. Emphasizing that the powers of the Court were wide, given the object that is sought to be achieved by the exercise of such power under Sections 397 and 398, it was explained that Clauses (a) to (g) of Section 402 "indicate the widest amplitude of the court's power". It was then explained as under:

An examination of the aforesaid Sections clearly brings out two aspects, first, the very wide nature of the power conferred on the court, and, secondly, the object that is sought to be achieved by the exercise of such power with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed there under and the object sought to be achieved by these Sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power. We are, therefore, unable to accept Mr. Sen's contention that the court's powers u/s 398 read with Section 402 should be read as subject to the other provisions of the Act dealing with normal corporate management or that the court's orders and directions issued thereunder must be in consonance with the other provisions of the Act.

34. It is plain from the above decision on the facts of the present case that it would be definitely open to the plaintiff to invite the CLB to examine the issues raised in the suit i.e. whether the DSIL can be said to be mismanaged on account of the audited accounts and Annual Report not reflecting the correct state of affairs. In fact, by the subsequent application filed before the CLB, the plaintiff has sought to bring on record the very averments and contentions raised in the present suit. This Court is unable to find any restriction on the power of the CLB to examine these issues.

35. In *Khetan Industries Pvt. Limited v. Manju Ravindraprasad* (supra) the learned Single Judge of the Bombay High Court followed the decision of the Supreme Court in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, to hold that the question whether a group of shareholders could seek the removal of a director by filing a civil suit should be answered in the negative. It was held that the civil court cannot interfere in such matters. They should be dealt with in accordance with the procedure laid down in the Act. It was observed that the rule in *Foss v. Harbottle* (1843) 2 Hare 461 applied in such a case. It did not fall in any of the known exceptions to the rule viz., , an act which is ultra

vires the company or illegal, an act which constitutes a fraud against the company and a resolution which requires a qualified majority but has been passed by a simple majority. It was held that the civil court's jurisdiction was impliedly barred.

36. The wide nature of the powers under the Act has been explained recently by the Supreme Court in *Kamal Kumar Dutta v. Ruby General Hospital Limited* (supra). It was observed in the context of Sections 397 and 398 that "the Act is a complete code". Likewise, the learned Single Judge of the Punjab & Haryana High Court in *Anil Gupta v. J.K. Gupta* (supra) held that the jurisdiction of the civil court was impliedly barred in relation to the question of oppression or mismanagement. The aggrieved persons could certainly approach the CLB. Notice was taken of the judgment of the Supreme Court in *M/S. Ammonia Supplies Corporation (P) Ltd. Vs. M/S. Modern Plastic Containers Pvt. Ltd. and Others*,

37. In *Ammonia Supplies Corporation (P) Limited* (supra) the Supreme Court was considering the question whether an application for rectification of the register of members in terms of Section 155 of the Act and disputes arising there under can be agitated before the civil court. It was held that in the first place the civil court was required to examine on the facts of each case whether the application made was for rectification or "something else". It was held that it was necessary to remove the cloak and examine what the dispute actually was about. It was further explained as under:

26. ...In case any claim is based on some seriously disputed civil rights or title, denial of any transaction or any other basic facts which may be the foundation to claim a right to be a member and if the Court feels such claim does not constitute to be a rectification but instead seeking adjudication of basic pillar some such facts falling outside the rectification, its discretion to send a party to seek his relief before civil court first for the adjudication of such facts, it cannot be said such right of the court to have been taken away merely on account of the deletion of the aforesaid proviso. Otherwise under the garb of rectification one may lay claim of many such contentious issues for adjudication not falling under it. Thus in other words, the court under it has discretion to find whether the dispute raised are really for rectification or is of such a nature, unless decided first it would not come within the purview of rectification.

38. Thereafter it was explained in para 31 as under:

31. ...So, whenever a question is raised court has to adjudicate on the facts and circumstance of each case. If it truly is rectification all matter raised in that connection should be decided by the court u/s 155 and if it finds adjudication of any matter not falling under it, it may direct a party to get his right adjudicated by civil court. Unless jurisdiction is expressly or implicitly barred under a statute, for violation or redress of any such right civil court would have jurisdiction. There is nothing under the Companies Act expressly barring the jurisdiction of the civil

court, but the jurisdiction of the "court" as defined under the Act exercising its powers under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of the civil court is impliedly barred.

39. The law, as explained by the Supreme Court in Ammonia Supplies Corporation (P) Limited (supra), is held and has been followed in Vijay M. Shah v. Flex Industries 2001 CC Vol. 103 1063, Reckit Benckiser (India) Limited Vs. Naga Limited and Others, , Hind Samachar Limited and Others Vs. Indian Newspaper Society and Another, and Amar Nath Malhotra v. MCS Limited 1993 76 CC 469). In Vijay M. Shah v. Flex Industries (supra), it was pointed out that after the 1988 Amendment to the Act, the jurisdiction of the Court to decide and determine matters pertaining to Sections 397 and 398 vested with the CLB and further the allegations concerning the matters covered by those provisions should be agitated only by the CLB.

40. Applying the ratio of Ammonia Supplies Corporation (P) Limited (supra) to the instant case, it requires to be noticed that the claim made in the suit does not contain any aspect which cannot be adjudicated by the CLB. u/s 402(g) of the Act, the power of the CLB would include the passing of an order which may provide for "any other matter for which in the opinion of the Tribunal it is just and equitable that provision should be made." u/s 398(1) of the Act, the scope of the power of the CLB is to determine whether "the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company". Likewise u/s 397, it is called upon to adjudicate on whether the affairs are being conducted "in a manner oppressive to any member or members". Further, both under Sections 397(2) and 398(2) of the Act, the CLB may "with a view to bringing to an end the matters complained of, make such order as it thinks fit." The inevitable conclusion is that the jurisdiction of the civil court is impliedly barred.

41. If there was any doubt whether the issues sought to be raised in the civil suit can be agitated before the CLB, that stands removed by the conduct of the plaintiff itself in filing a further application before the CLB "for placing on record additional and subsequent facts, documents and ground along with supporting affidavit." A perusal of the application filed on 28th February 2008 would show that the very averments made in the plaint, i.e out about the investments in DSIL and in DHL and other facts set out in the plaint have been included in the application before the CLB. It is not, therefore, possible to accept the plea of the learned Senior counsel for the plaintiff that what constitute the subject matter of the suit is different and distinct from what is being presently agitated before the CLB.

42. The learned Senior Counsel for the plaintiff, however, placed reliance upon certain other judgments which seemingly hold a contrary point of view. In Pradeep Kumar Sarkar v. Laxmi T. & Co., the question that arose was whether there was any impediment in the exercise of the powers by the Court to supersede the Board of Directors of the company although it had the support of

the majority if it was found that the Board of Directors had acted malafide or in a manner oppressive to the shareholders or in a manner prejudicial to the interests of the company or to public interest. It was held that the court always had jurisdiction to prevent abuse of the majority power. The Court found that the management had refused to register the transfer of shares to ensure that no change took place in the composition of the Board of Directors. Accordingly, the Board of Directors was required to be superseded and restrained from functioning any further. It was held that there was no impediment of the Act in the exercise of power by the Court to supersede the Board of Directors of a Company, although it has the support of the majority. What requires to be noticed is that this was a petition before the High Court under Sections 397 and 398 of the Act at a time when the 1988 Amendment had not come into effect and the powers thereunder had not been transferred to the CLB. The facts are also not similar. There the plaintiff had not earlier approached a different forum before filing the suit. In the considered view of this Court, the above decision does not help the plaintiff.

43. The facts leading to the decision of the Kerala High Court in *Dr. T.M. Paul v. City Hospital (Pvt.) Limited* (supra) were that the minority shareholders complained that the majority was attempting to place a heavy financial burden on the company by the purchase of equipment and also lease of the hospital which were against the interests of the company and could not have been approved by the majority. It was held that the principle in *Foss v. Harbottle* (1843) 2 Hare 461 could not be a bar to granting the reliefs sought for in the suit. Negating the argument that there was a remedy available before the CLB under Sections 397 and 398 of the Act, it was held that the scope of an application under those Sections was limited. It was further held: "It is intended to prevent only continuing wrongs and does not enable the shareholders to challenge concluded transactions. Moreover, the provisions are essential intended against the tyranny of the majority against the minority shareholders." With respect, this Court is unable to accept the conclusion arrived at by the Kerala High Court, although reliance was placed upon the judgment in *Avanthi Explosives P. Limited v. Principal Subordinate Judge Tirupathi* [1987] 62 Comp Cas 301 (AP). It must be recalled that these decisions were given at a time when the judgment of the Supreme Court in *M/s. Ammonia Supplies Corporation (P) Limited* (supra) was not available. There is no reference, therefore, to the said decision in the judgment of the Kerala High Court.

44. Reliance was placed on the judgment of the Madras High Court in *Spices Valley Estate Limited v. TC Forexpress Limited* (supra). Here again, on facts it was held that when the allegations related to misrepresentation, fraud, failure to furnish details, dishonest or mala fide intention, the jurisdiction of the civil court was not barred. What distinguishes the present case from the aforementioned case is that the plaintiff there had not opted to go before the CLB before approaching the civil court. Here the plaintiff first approached the CLB and failed to obtain any interim relief. It cannot be permitted to approach the civil court

seeking the same relief as that would encourage forum shopping and constitute an abuse of the process of law.

45. In *In re. Jaypee Cement Limited*, the learned Single Judge of the Allahabad High Court was called upon to approve a scheme of amalgamation between two companies under Sections 391 and 394 of the Act. Again this decision cannot help the plaintiff. In the first instance the said petition did not deal with the situation where shareholders had already approached the CLB in a petition under Sections 397 and 398 of the Act and subsequently when interim relief was refused by the CLB, they approached the civil court. Consequently that case was really about the powers of the Court to approve a scheme of amalgamation. The 1998 Amendment does not bring about any change to that situation.

46.1 Extensive arguments were addressed by Mr. Haksar on the basis of the decision of the Division Bench of the Bombay High Court in *CDS Financial Services (Mauritius) Limited v. BPL Communications Limited* (supra). The plaintiff there filed a suit seeking a declaration that an agreement dated 27th June 2001 among four groups of shareholders agreeing that the cellular business of Defendant No. 1 conducted through its subsidiaries would ultimately be merged with the cellular business of the operating subsidiaries of Birla- Tata-AT&T ("BTAL") was without the approval and sanction of the shareholders of the company u/s 293(1)(A) of the Act and therefore was null and void. An injunction was prayed for restraining the Defendant from giving effect to the said agreement as well as to the resolution of the Board of Directors of 25th July 2001.

46.2 The plaintiff challenged the impugned action on three grounds namely; (a) that the conduct of the Defendant was actuated by mala fides; (b) the transaction required the consent of the shareholders u/s 293(1)(A) of the Act; and (c) if the transaction were completed without the approval of the company in a general meeting, it would be ultra vires the company. A preliminary objection was raised by the Defendant that the arguments based on mala fides were really in substance an allegation of oppression and mis-management by the majority shareholders coming under the purview of Sections 397 and 398 of the Companies Act and that the "plaintiff should have approached the Company Law Board for appropriate reliefs."

46.3 The Division Bench of the Bombay High Court in *CDS Financial Services (Mauritius) Limited v. BPL Communications Limited* took note of the legal position arising from the earlier decisions of the Supreme Court in *Dhulabhai v. State of Madhya Pradesh* and *Raja Ram Kumar Bhargava v. Union of India*. It also took note of the later decision in *Ammonia Supplies Corporation Private Ltd. v. Modern Plastic Containers Pvt. Ltd.* as well as the judgment of this Court in *Vijay M. Shah v. Flex Industries Ltd.* It was observed that "if the right is traceable to general law of contract or it is a common law right, it can be enforced through civil court, even though the forum under the statute also will have jurisdiction to enforce that right." The Division Bench appears to have relied upon a decision by another

Division Bench of that Court in Herbertson's case [2002] 109 Comp Cas 913 where the Hongkong & Shanghai Banking Corporation case was considered and it was held that notwithstanding the fact that the plaintiffs in that case could approach the Company Law Board u/s 111A of the Act, the plaintiff had a common law right to seek rectification of registration of members and that "pre-existing common law right can be taken away only by express enactment or necessary implication." Accordingly the preliminary objection was overruled.

46.4 To this Court, it appears that the facts of the present case are different inasmuch as the plaintiff here has already approached two other fora namely the CLB with a petition u/s 397 and 398 as well as the SEBI and SAT. This is, therefore, not a case where the plaintiff first sought remedy before a civil court. Here the doctrine of election would apply. If the plaintiff chooses to enforce its right first before the CLB, can it then be permitted to also approach the civil court particularly when CLB refuses interim relief? Such a question was never considered in CDS Financial Services (Mauritius) Limited. This Court is therefore unable to accept the arguments of Mr. Haksar that notwithstanding the availability of a remedy before the CLB, this Court should entertain the present suit.

Conclusion:

47. Having carefully examined the plaint as well as the averments made in the petition before the CLB, as further sought to be amended by the subsequent application, it appears to this Court that the grounds on which the relief is being sought for are more or less similar to what has been sought in the CLB. In the considered view of this Court, therefore, the answer to the question first posed is that there is an implied bar to this Court entertaining the present suit.

48. Although the learned Senior counsel for the plaintiff may be right in his contention that the suit is itself not barred u/s 41(h) SRA, the fact remains that the suit is reduced to one seeking a bare declaration if the consequential prayers for injunction are barred since they have already been sought in other earlier proceedings before the CLB and SAT. Such a suit for a bare declaration (which in any event is not the form of prayer even after the proposed amendments) would be barred expressly by Section 34 SRA.

49. For the above reasons, the application is allowed. The plaint is rejected. Consequently, the suit is dismissed with costs. The other pending applications are also dismissed.