

(2012) 07 CAL CK 0123

In the Calcutta High Court

Case No : A.P.O No. 44 of 2010, A.P.O.T. No. 169 of 2009 and A.C.O. No. 37 of 2009

In Re: Castron Mining Limited

Date of Decision : 06-07-2012

Acts Referred:

Arbitration Act, 1940 — Section 41

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 39 Rule 4, Order 7 Rule 11, 10, 151

Companies Act, 1956 — Section 10E(4C), 10F, 397, 398, 41

Citation : (2012) 4 CALLT 491

Hon'ble Judges : Patherya, J

Bench : Single Bench

Advocate : S. N. Mukherjee, Sr, Mr. Ratnanko Banerjee, Mr. A. K. Bose and Mr. Kuldip Mallick, for the Appellant; Anindya Kumar Mitra Mr. Tilok Bose, Mr. Debangsu Basak, Advocate and Mr. Piyush Meharia, for the Respondent

Final Decision : Allowed

Judgement

Patherya, J.—This appeal u/s 10F of the Companies Act, 1956 has been filed from order dated 17th April, 2009 passed by the Company Law Board. The case of the appellant is that C.P. 50 of 2007 was filed under Sections 397 and 398 of the 1956 Act before the Company Law Board, New Delhi (CLB) on grounds of oppression. An ex parte interim order was passed on 8.5.2007. C.A. 251 of 2009 was filed for vacating of the said interim order and for dismissal of C.P. 50 of 2007. As no interim stay was granted three appeals u/s 10F of the Companies Act, 1956 were filed from order dated 13th July, 2007 and by order dated 16.10.2007 the Company Law Board was directed to first decide the question of maintainability and then proceed to decide the matter on merit. The reason for seeking dismissal of the proceedings before the CLB was that a suit had been filed in Alipore Court being T.S. 37 of 2005 on an identical subject matter and vacating of the order dated 8.5.2007 was also sought as the order was ex parte and contrary to the order passed in the suit and without any reason. The maintainability issue was decided in favour of the appellant and the CLB proceedings stayed till disposal of the civil suit, by order dated 17th April, 2009

and on the basis of the findings on the maintainability issue the CLB could not have proceeded to continue the order dated 8.5.2007 in view of Order 14(2)(2) of the Code of Civil Procedure, as it was not empowered to grant the final relief till disposal of the suit, therefore the continuance of the order dated 8.5.2007 is erroneous. In the revisional proceedings before the Division Bench one of the issues which arose for consideration was who is to represent the company and by the order of the Division Bench the said issue is to be decided before framing of issues and after filing of written statement. The CLB by its order dated 17.4.2009 has stayed the proceedings before it but has continued the interim order dated 8.5.2007 in the suit before the Alipore Court which it is not empowered to do. The application under Order 1 Rule 8 of the CPC was dismissed on 18.5.2007. There has also been suppression of the proceedings before the Supreme Court and as suppression unravels all, the order dated 17.4.2009 be set aside. For the said proposition reliance is placed on *Barbara Taylor Bradford Vs. Sahara Media Entertainment Ltd.*, , *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, , *Prestige Lights Ltd. Vs. State Bank of India*, *Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others*, and *North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs.*, .

2. By virtue of Rules 6 and 9 of the Company Court Rules the CPC is made applicable to proceedings filed under Sections 397 and 398 of the Companies Act, 1956. To avail of equitable remedy a party must come to Court with clean hands as held in *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*,

3. As by the order dated 16.10.2009 the maintainability issue was to be decided first by the CLB and then it was to proceed to consider the merits of the case and the maintainability issue upheld, the interim order could not have been continued. The merits were considered to continue the order which could not have been done. The resignation of the appellants' group i.e. the MKA Group is to be decided by a Civil Court, therefore representation of the company by Anup Agarwalla Group could not have been decided and the order dated 17.4.2009 being erroneous be set aside.

4. In opposing the said appeal counsel for Anup Agarwalla submits that from order dated 17.4.2009 two appeals have been filed one by Mahendra Kumar Agarwalla Group and the other by the Anup Agarwalla Group. The appellant herein is aggrieved by the continuance of the order dated 8.5.2007 while the Anup Agarwalla group is aggrieved by the stay of CLB proceedings. Therefore what needs examination is whether the discretion exercised by the CLB in staying the CLB proceedings is proper. The appellant has contended that by staying the CLB proceedings the interim order ought not to have been continued. Additional grounds vis a vis suppression of SLP and pendency of SLP have been canvassed which is not in the vacating application. In the SLP filed there has been no substitution in place of P.K. Agarwalla who died therefore the SLP filed by him was dismissed and the interim application is pending as an appeal.

Vacating of interim order dated 8.5.2007 is not a question of law therefore it is not to be decided. In Order 39 Rule 4 the word used is "shall" and therefore vacating is discretionary. The Company was controlled by the Agarwalla family and under the scheme of arrangement the Company was to go to P.K. Agarwalla. The scheme which was sanctioned was signed by the MKA Group. In the Title Suit filed before the Alipore Court an application was filed under Order 7 Rule 11 which was initially allowed and in appeal the order set aside. Three Special Leave Petitions were filed, the SLP filed by P.K. Agarwalla and his heirs was dismissed. Two SLPs are pending as civil appeals. In 2005 the suit was filed in the Alipore Court but no writ of summons has been served on all the defendants and the suit is not proceeding. The application filed under Order 1 Rule 8 of the CPC was dismissed. The respondents are not interested in pursuing the suit. Therefore in these facts the proceedings before the CLB ought not to have been stayed. The vacating application was disposed of by order dated 17th April, 2009 and the ground for vacating is suppression.

5. Although reference has been made to the order dated 26th September, 2005 passed in appeal by the High Court and Special Leave Petitions filed but no plea of suppression in respect thereof has been taken. The plea of suppression was not an issue before the Tribunal neither was it argued nor pleaded in the vacating application. This is an issue which has been raised for the first time in appeal. This is also not a ground taken in the Memorandum of Appeal but has been raised by a Supplementary Affidavit. Therefore the suppression of the SLP was not considered by the CLB and in respect of the suppression pleaded before CLB the same has been dealt with and it has been held that there was no suppression. Therefore the suppression vis a vis the proceedings before the Supreme Court is not to be considered as it is not a question of law but is a question of fact. In an appeal the High Court's jurisdiction is restricted to questions of law in the order therefore the High Court has no jurisdiction to go into questions of fact. The order dated 7th May, 2007 was corrected to 9th May, 2007. The interim applications were dismissed and by order dated 27th February, 2006 two SLPs filed were admitted and are pending as civil appeals. The order dated 16.01.2006 has not been mentioned in the opposition filed and it is only in the reply filed to the vacating application in January, 2008 that the order dated 16.01.2006 finds mention. The hearing on the vacating application was concluded on 22nd September, 2008 and order passed on 17th April, 2009. For the first time in the Memorandum of Appeal filed the plea of suppression has been taken. Therefore, it is in this appeal that the plea of suppression is being pursued but the said plea will not be traceable in the records of the CLB. In the opposition filed to the 397 proceedings on 12th May, 2008 the order of 16.01.2006 finds no mention. The affidavit has been affirmed in Calcutta on 15th March, 2008 and it is not known when the same was filed before the CLB. The order of the High Court dated 16th October, 2007 directed the maintainability issue to be considered but in the vacating application there is no mention of the order dated 16th January, 2006. It is in passing that the said order finds mention

but it was not argued before the Tribunal, therefore the same was not dealt with by it. The substitution application was filed before the Division Bench but no service was effected. By the order of the Division Bench dated 26th September, 2005, the Title Suit revived and from the said order separate Special Leave Petitions were filed. One SLP was also filed by the substituted heirs of PKA, the defendant No.1 in the Title Suit in August, 2005. Subsequently it was dismissed as withdrawn and no suppression can be alleged.

6. By virtue of Section 10 of the CPC trial of a suit is stayed but proceedings are not stayed therefore, the interim order could be extended. Reliance has been placed on 67 CWN 603, AIR 1999 Delhi 73, 52 CWN 46, AIR 1922 Bombay 276 and AIR 1999 AIHC 2001. As CLB held that the proceedings were maintainable therefore should have stayed the suit and extended the interim order.

7. In reply counsel for the appellant submits that the points urged is that the plea of suppression was not taken before the CLB and it was not the SLPs which were dismissed but the interim applications which were dismissed. In the reply filed in the proceedings before the CLB the plea of suppression was specifically taken so also in the rejoinder to the vacating application. In fact the said issue has been dealt with in the order dated 17.04.2009. Even in the application for vacating the interim order so also in the affidavit-in-opposition filed to the Special Leave Petitions which are pending suppression has been pleaded. Suppression of facts will render the order to be perverse and the said therefore is a question of law. In the vacating application the facts relating to dismissal of the interim application has been specifically dealt with and it is contrary to the facts on record. The cases of suppression have not been dealt with. It has been urged that there is no material suppression. This is incorrect as has been shown earlier and therefore the proceedings are liable to be dismissed.

8. It has also been argued that the proceedings though stayed, interim orders can be passed for which reliance has been placed on 67 CWN 603 which is distinguishable as the case was u/s 41 of the Arbitration Act and Section 151 of the Code of Civil Procedure. Such is not the case before the CLB. 52 CWN 45 is also distinguishable for the same reasons. Section 10 is to apply to suits and not to CLB proceedings. Therefore AIR 1922 B 276, AIR 1999 Delhi 73 and 1999 AIHC 2001 are not applicable. It has been contended that irrelevant materials have been considered and findings of fact could not have been considered. In a 10F appeal that findings of fact can be considered has been held in Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, Therefore order dated 17.4.2009 in so far as it extends the interim order dated 8.5.2007 be quashed.

9. Having considered the submissions of the parties, CP 50 of 2007 was filed by the Anup Agarwalla group and an interim order was passed on 8.5.2007 restraining the appellants herein from representing or acting on behalf of the company. Accordingly CA 251 of 2007 was filed for not only vacating the order dated 8.5.2007 but also dismissal of CP 50 of 2007. By order dated 13th July,

2007 the Tribunal refused to vacate the interim order passed but extended the time for filing affidavits and also extended the interim order. The appellants being aggrieved filed appeals u/s 10F of the 1956 Act and by order dated 16th October, 2007 the appeal was disposed off and the Tribunal directed to consider the maintainability issue before deciding the case on merit. Accordingly the maintainability issue was first considered by the Tribunal and the CLB proceedings stayed till disposal of the civil suit filed in Alipore Court. Reasons were also given for the same and although the said reasons have been questioned in APOT 186 of 2009, the said need not be considered in this appeal. In spite of the said finding, the Tribunal proceeded to consider the case on merits and extended the interim order on the ground that there was no suppression and that the order dated 8.5.2007 was not contrary to order dated 26.9.2005.

10. Suppression was an issue raised before the Tribunal. In fact in paragraph 54 of the petition filed under Sections 397 and 398 of the Companies Act the Anup Agarwalla group has pleaded that SLP (Civil) No. 25056-57 of 2005 filed by its group are pending. In fact this SLP was dismissed on 16th January, 2006 i.e. before the filing of the CLB proceedings. SLP (Civil) No. 22574-75 of 2005 filed by Mahesh Phulchand Modi, the defendant No.2 in the Civil Suit and who is not a party before the Tribunal was admitted by order dated 27th February, 2006. The interim application filed therein for stay of Title Suit filed in Alipore Court was dismissed on 9th May, 2007. Admittedly the SLP filed by the respondent group was dismissed in January, 2006 and the finding of the Tribunal that the SLP was dismissed on 9.5.2007 evidences total non-application of mind.

11. On an application filed under Order 7 Rule 11 of the Code of Civil Procedure, T.S. 37 of 2005 was dismissed and in appeal the order of the Trial Court was set-aside. Therefore the suit revived and whether the MKA group, plaintiffs in the suit would be entitled to represent the company is an issue to be decided provided in the written statement such point is raised.

12. In spite of the aforesaid the interim order dated 8.5.2007 was continued. The respondents have contended that suppression was not pleaded in the vacating application and the case of suppression was made out in the rejoinder. Contrary to the said submission the issue of suppression was raised in not only the vacating application but was also dealt with by the Tribunal. It has also been taken as a ground of appeal. Therefore the contention of the respondents cannot be accepted. The Tribunal while holding that C.P 50 of 2007 is maintainable has stayed it till disposal of the Civil Court. The ground on which the interim order has been continued is that there is no suppression which is an incorrect finding as discussed above.

13. The second ground is the non-applicability of the High Court's order dated 26.9.2005. The High Court by its order dated 26.9.2005 has accepted the right of the appellants to represent the Company to file the suit and in the event this authority is denied in the written statement, it is to be decided as a preliminary issue in the suit and it is only if the said issue is decided against the MKA group

could any orders be passed in favour of the PKA group. The Tribunal by continuing the order dated 8.5.2009 has pre-determined the issue with regard to persons entitled to run the Company. This it was not entitled to do in view of the stay granted and ought to have left it to the parties to obtain orders in the Civil Court.

14. A litigant is to come to Court with clean hands and as there has been misrepresentation of material facts with regard to pendency of SLP and the Tribunal has also proceeded thereon and held that there is no suppression, therefore the order be continued, the decisions cited by the appellants come to its aid.

15. There is no doubt that the CLB is a Tribunal and has the trappings of a Court to the extent laid down in Section 10E(4C) & (4D) so also as regards the principles of natural justice and Regulation 44 of the 1991 Regulation.

16. There is no Regulation akin to Section 10 of the CPC. Regulation 44 is akin to Section 151 of the CPC and there was nothing to stop framing of Regulation akin to Section 10 but the same has not been done by the legislature in its wisdom. If this be so then AIR (1922) Bom. 276 and AIR (1999) Delhi 73 relied on by the respondents do not come to its aid. Both the decisions were cases wherein the suits filed in Courts had been stayed u/s 10 of the Code of Civil Procedure. CLB being a Tribunal the question of applying Section 10 of the CPC does not arise. In AIR (1999) AIHC 2001, it has been held that a duty is cast on the Court staying the proceedings to consider whether the stay will operate as a bar and it is only when the interim order has nothing to do with the trial nor determination of rights, should an interim order be passed. Such is not the case here as continuance of the order dated 8.5.2007 will amount to prejudging the issue in view of order dated 26.9.2005. In fact the said decision is distinguishable on facts as in the case cited refusal of the lower court to entertain the interlocutory application was deprecated.

17. 67 CWN 603 so also 52 CWN 45 are distinguishable as both were cases under the Arbitration Act, 1940 and u/s 41 interim orders could be passed, even if stay was granted.

18. As the Tribunal has based its order on the lack of suppression and nondisclosure of correct facts is evident, the observation of Lord Denning in the case of Lazarus Estates Ltd. -vs.- Beasley that "fraud unravels all" would not warrant continuance of order dated 8.5.2007 and renders the order dated 17.4.2009 bad.

19. Even assuming that the issue of suppression is a finding of fact but such finding is based on non-application of mind and non-appreciation of evidence and therefore is perverse and becomes a question of law as held in Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, and entitles the Court to consider the same. For all the said reasons continuance of the order dated 8.5.2007 by order dated 17th April, 2009 cannot be sustained in the eye of

law and is accordingly set aside and the appeal succeeds.

Later:

Urgent photostat certified copy of this judgment be made available to the parties, if applied for, upon compliance of all requisite formalities.