
(1979) 03 BOM CK 0012

In the Bombay High Court

Case No : Company Petition No. 534 of 1974

In Re: Kelly and Henderson P. Ltd., L. Jai Kulbir Singh and Another

Date of Decision : 19-03-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, 141
Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1956 — Section 299, 300, 397, 398, 402

Citation : (1980) 50 CompCas 646

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : R.A. Kapadia, for the Appellant; Bomi R. Zaiwalla, R.L. Mukherjee, for the Respondent

Judgement

Smt. Sujata Manohar, J.—The petitioners are the shareholders of M/s. Kelly and Henderson P. Ltd., a company incorporated on 16th November, 1947, with an authorised share capital of Rs. 25 lakhs divided into 2,500 shares of Rs. 1,000 each and the issued capital of Rs. 5,40,000 divided into 540 shares of Rs. 1,000 each out of which only 140 shares are fully paid up while 400 shares are unpaid. The 2nd petitioner is also a director of the company. The main business of the company is running a hotel known as "Hotel Waldorf."

2. It appears to be almost a family concern. The petitioners are sisters. Their father, Sardar Bakshi Dalip Singh, claims to have started this company. Apart from the petitioners who are the daughters of Sardar Bakshi Dalip Singh, the other shareholders are the widowed daughter-in-law, the two grandsons and the wife (since deceased) of Sardar Bakshi Dilip Singh. The only outsider is Sardar Teja Singh who holds 2 shares in the company. The present petition has been filed under ss. 397 and 398 of the Companies Act, 1956, asking for various reliefs set out in the petition on the ground of oppression and mismanagement. When the petition was admitted some time in December, 1974, the petitioners were directed to give notice to Sardar Bakshi Dalip Singh and Sardar Teja Singh. Sardar Teja Singh has throughout remained absent. Till 15th June, 1979, the company was represented through various advocates, who were instructed to

appear on behalf of the company by Sardar Bakshi Dalip Singh who is the managing director of the company. At one stage, Sardar Bakshi Dalip Singh appeared personally. On 14th June, 1979, when the matter reached hearing, the company was represented by Mr. F. E. Merchant, advocate and he was being instructed by Sardar Bakshi Dalip Singh. On June 14, 1979, a compromise was arrived at between Mr. S. H. Doctor who appeared on behalf of the petitioners and Mr. F. E. Merchant who appeared on behalf of the company. Various alterations were made in the draft consent terms on that day in court and ultimately an agreement was arrived at between the parties and signed by the advocates for both the sides. Throughout these negotiations and at the time when the consent terms were signed by the advocates for both the parties, Sardar Bakshi Dalip Singh was present in court and he had agreed to the consent terms so arrived at. However, as there were a lot of alterations in ink made in the draft which had been signed by the advocates, Mr. Doctor asked for time till 2-45 p.m. on that day to put in a fair draft duly signed by the parties. On 2-45 p.m. on that day, however, I was informed that the fair consent terms were ready but Sardar Bakshi Dalip Singh was not being allowed to come to court to sign the consent terms. Under the circumstances, I adjourned the matter to the next day. Various events transpired thereafter which need not be gone into. On the next day, however, Mr. Merchant was permitted to withdraw this appearance on behalf of the company. Thereafter, the present advocates of the company have filed their appearance on behalf of the company.

3. After Mr. Merchant withdrew his appearance and the present advocates for the company appeared on the scene, the company challenged the compromise which was arrived at between the parties on 14th June, 1979.

4. Mr. Kapadia, who appears for the petitioners, has relied upon the provisions of O. 23, r. 3 of the CPC in this connection and he has asked for the recording of the compromise arrived at between the parties on June 14, 1979. The provisions of the Companies Act and the CPC must, therefore, be examined to ascertain whether O. 23, r. 3, can be applied to a compromise of a petition under ss. 397 and 398 of the Companies Act. Under s. 643(1)(b)(v) of the Companies Act, 1956, the Supreme Court after consulting the High Court is entitled to make rules consistent with the CPC, 1908, generally for applications to be made to the court under the provisions of the Companies Act. Under r. 6 of the Companies (Court) Rules, 1959, which are framed under s. 643 it is provided as follows :

"6. Practice and procedure of the court and provisions of the Code to apply. - Save as provided by the Act or by these Rules, the practice and procedure of the court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the court."

5. Section 141 of the CPC lays down that the procedure provided in the CPC in regard to suits shall be followed as far as it can be made applicable, in all

proceedings in any court of civil jurisdiction. Relying upon these provisions in the Companies Act and the CPC, Mr. Kapadia has urged that the provisions of O. 23, r. 3, apply to a compromise arrived at in a proceeding under the Companies Act including a proceeding under ss. 397 and 398 of the Companies Act. The provisions of O. 23, r. 3, as amended are as follows :

"3. Compromise of suit. - Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties) or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit)."

6. Under the provisions of this Order, therefore, the court is bound to pass a decree or order in accordance with the terms of the compromise when the parties to any proceeding have arrived at any lawful agreement or compromise in writing and signed by the parties. He has drawn my attention to the case *Surendra Shankar Waikar v. Laxman Shankar Waikar* [1960] 61 BomLR 757; AIR 1960 Bom 20 , which deals with an implied authority of an advocate to compromise on behalf of his client. He has, therefore, urged that the compromise in writing which is signed by the parties through their advocates must be recorded as a compromise by the court and an order must be passed accordingly. In support of his argument that the provisions of O. 23, r. 3 and s. 141 apply to the proceedings under the Companies Act he has relied upon a number of authorities. In the case of *Vadilal Chatrabhuj Gandhi Vs. Thakorelal Chimanlal Munshaw and Others*, , the provisions of O. 23, r. 3, were applied to a misfeasance summons taken out under the Companies Act. The other cases relied upon in this connection by the petitioners are *Sm. Bhagwanti v. New Bank of India Ltd.* [1950] 20 Comp Cas 68; AIR 1950 East Punj 111 , *Official Liquidators, Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co., Ltd. Vs. President, Council of Regency, Pt. Ram Roop Sharma v. C. R. E. Wood & Co. (P.) Ltd.* [1958] 28 Com Cas 68, 70 (Punj) and *Jacob Cherian v. K. N. Cherian* [1973] 43 Com Cas 235 (Mad). In the last case provisions of O. 23, r. 1 of the CPC were made applicable to a petition under ss. 397 and 398 of the Companies Act. None of these cases deal with the application of O. 23, r. 3, to a petition under ss. 397 and 398 of the Companies Act. What, therefore, requires to be examined is the extent to which the provisions of O. 23, r. 3, can be applied to a petition under ss. 397 and 398 of the Companies Act. If the provisions apply, then in the present case, there is no doubt that there is a compromise which is arrived at between the parties to the present proceeding which is in writing and signed by the parties through their advocates.

7. Under the provisions of s. 643(1)(b)(v) of the Companies Act, 1956, read with r. 6 of the Companies (Court) Rules, 1959, the provisions of the CPC apply to a

proceeding under the Companies Act "in so far they are applicable". Similarly, under s. 141 of the CPC also the procedure provided for in the Code is required to be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction. To what extent, therefore, are the provisions of O. 23, r. 3, applicable to a petition under ss. 397 and 398 of the Companies Act ? Basically the provisions of both these sections provide for relief in cases of oppression of minority shareholders and in cases where the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. Wide powers are given under these sections to the court to pass an order which will be in the interests of the company. Similar powers are given when a relief is asked for in the case of mis-management. In such a situation, where the petitioners ask for relief from oppression or mismanagement, any compromise which deals with the manner in which the affairs of the company will be conducted in future must be scrutinised by the court before the court gives its sanction to the compromise. In the case of such a petition, the parties to the petition cannot insist on an order being passed simply on the ground that the parties to the litigation have agreed to it. In Ramaiya's Guide to the Companies Act, 8th Edn., p. 784, it is stated as follows :

"Proceedings under sections 397 and 398 cannot be compromised in the same way as suits between private parties. Any compromise should be acceptable to the court whose powers are set out in this section."

8. In the case of a compromise, therefore, which is arrived at in a petition under ss. 397 and 398 of the Companies Act, the compromise must be examined by the court to ascertain whether such a compromise will be in the best interests of the company. In this connection, reference may be made to a decision in Syed Mahomed Ali v. R. Sundaramurthy [1958] 28 Com Cas 554; AIR 1958 Mad 587. A Division Bench of the Madras High Court in the above case held as follows (p. 561) :

"Both under sections 397 and 398 the interests of the company are of paramount importance and the proceedings should not be conceived as a mere dispute between individuals. Any compromise suggested should be acceptable to the court whose powers are set out in section 402. Even accepting the argument, the compromise which has not been agreed to by Syed Mahomed Ali, one of those represented in the petition, cannot be used to stifle the enquiry of the petition in the absence of a finding that the compromise was entered into bona fide in the interests of the company as a whole."

9. The present compromise, therefore, must be examined in the light of these observations.

10. In order to decide whether the compromise arrived at is in the larger interests of the company or not, it is necessary to examine the shareholding of the company at present. The paid up share capital of the company consists of only 140 shares. At the time of the filing of the petition, petitioner No. 1 held 2

shares, petitioner No. 2 held 12 shares, Anoop Jagtar Singh (widow of the deceased Jagtar Singh, who was the son of Sardar Bakshi Dalip Singh) held 2 shares, Sardar Bahadur Bakshi Dalip Singh held 2 shares, Sardar Teja Singh held 2 shares and Maya Jagtar Singh (deceased) held 120 shares. In addition to these shares, 200 unpaid shares were issued in the name of Maya Dalip Singh, wife of Sardar Bakshi Dalip Singh (since deceased) and further 200 unpaid shares were issued in the name of Sardar Bakshi Dalip Singh. These 400 shares are the subject-matter of dispute in the present petition. At the time when the petition was filed 120 shares stood in the name of Major Jagtar Singh who had died on November 13, 1972. It seems that after the petition was filed these shares have been transferred to the name of the widow of Major Jagtar Singh, that is to say, in the name of Anoop Jagtar Singh, while out of the 2 shares, which stood in the name of Anoop Jagtar Singh, one share has been transferred to Kamalbir Singh and one share has been transferred to Rajbir Singh, the two sons of the deceased, Major Jagtar Singh. There is a dispute regarding transfer of these shares to them. It is not necessary to examine this dispute at the present stage. Kamalbir Singh and Rajbir Singh claim to be the directors of the company since November, 1978, but this claim is also disputed by the petitioners. In any case, it is clear that the two petitioners are the minority shareholders of the company holding between them 14 shares out of 140 paid up shares of the company. In the petition the 2nd petitioner is claiming to be a director of the company. Sardar Bakshi Dalip Singh is the managing director of the company. The petitioners have challenged the appointment of Sardar Teja Singh as a director of the company. At the time when the petition was filed, the 2nd petitioner, Sardar Bakshi Dalip Singh, and Sardar Teja Singh were the three directors of the company. After the filing of the petition, Kamalbir Singh and Rajbir Singh claim to have become the directors of the company.

11. The consent terms must be examined in the light of this shareholding. Under the consent terms, the board of directors of the company for a period of five years shall consist of Sardar Bakshi Dalip Singh and the petitioners. A power is reserved to the board of directors to appoint any person or persons as additional directors. Sardar Bakshi Dalip Singh is made the managing director of the company for life on the terms and conditions which are set out in the consent terms. The second petitioner is appointed the joint managing director of the company for a period of five years. Basically, therefore, under the compromise, the management of the company will be in the hands of the petitioners along with Sardar Bakshi Dalip Singh.

12. Now, should such an arrangement be sanctioned ? The main business of the company is conducting a hotel known as "Hotel Waldorf". The ownership of the building in which the business of running the hotel is carried on, stands in the names of the petitioners and two other daughters of Sardar Bakshi Dalip Singh. They have filed suits in the Court of Small Causes at Bombay for recovery of possession of the building from the company on the ground of non-payment of rent for a number of years. Since 1974 a number of rooms in the building have

been given by the company to M/s. Coal Mines Authority Ltd. There are litigations between the petitioners and the company and parties in respect of letting out of the rooms of the hotel to M/s. Coal Mines Authority Ltd. There is, therefore, a direct conflict of interest between the petitioners as the lessors of the property to the company and the company which is the lessee. Under the circumstances, it would be contrary to the interest of the company to put the petitioners in control of the management of the company. It is true that under ss. 299 and 300 of the Companies Act, whenever a director of a company is directly or indirectly or indirectly concerned or interested in a contract or arrangement entered into by or on behalf of the company he is not merely required to declare his interest but he also cannot participate or vote in the proceedings of the board of directors. It is a moot point whether these two sections will apply in a case where the directors of the company have suits against the company which the company is required to defend. In any case, assuming that the two sections do apply, and that the petitioners will have no say in the conduct of litigation on behalf of the company, the only person who will be in charge of the conduct on behalf of the company will be Sardar Bakshi Dalip Singh who is to-day 90 years old and against whom a number of allegations have been made in the petition. In fact, it is the case of the petitioners that Sardar Bakshi Dalip Singh has mismanaged the company and has run the company in a high-handed manner as if he were the sole owner of the company. Thus, it would not be in the interests of the company to have the management of the company in the hands of Sardar Bakshi Dalip Singh in respect of matters which are of vital concern to the company, namely, fighting litigations in the Court of Small Causes at Bombay. These litigations are vital to the survival of the company because the company carries on the business of running a hotel. If the company loses the premises in which its business is carried on nothing would survive of the company.

13. There are a number of other terms which have also been objected to by the company. Thus, under the consent terms, a sum of Rs. 2 lakhs, which is claimed by the partnership firm known as M/s. Sata Sawhney and others (wherein the petitioners and two other daughters of Sardar Bakshi Dalip Singh are partners), is sought to be adjusted against 200 unpaid shares of the company in the name of Sardar Bakshi Dalip Singh. These 200 shares are converted into fully paid up shares as a result, and they are distributed equally among the petitioners and two other daughters of Sardar Bakshi Dalip Singh. The majority shareholders of the company today are the widow and two sons of Major Jagtar Singh who between them hold 122 shares of the company. As a result of the consent terms the petitioners and the two other daughters of Sardar Bakshi Dalip will between them become the majority shareholders of the company. This by itself is not a ground for not sanctioning the consent terms because in a petition under ss. 397 and 398 of the Companies Act, the court is not required to safeguard the interest of any particular group of shareholders, whether this is a majority or a minority group. However, the interests of the company must be safeguarded when orders are passed under ss. 397 and 398 of the Companies Act. In the present case, as

I have pointed out, it would be in the interests of the company if the management of the company if the management of the company goes entirely into the hands of the petitioners and the two other daughters of Sardar Bakshi Dalip Singh since there is a major conflict of interest them and the company. Under the circumstances it would be contrary to the interests of the company to make them the majority shareholders of the company.

14. My attention is drawn of the commentary in Mulla's Code of Civil Procedure, Vol. II, 13th Ed., p. 1303, wherein while commenting on the provisions of O. 23, r. 3, it has been stated as follows :

"If persons other than parties to the suit are parties to the compromise it cannot be recorded unless those persons are brought on the record as parties to the suit. Thus is because the court has to be satisfied before recording a compromise under this rule that there is a lawful compromise, and this is not possible in the absence of those that are not parties to the suit."

15. The present compromise affects not merely the parties involved in the compromise, that is to say, the petitioners, the company and Sardar Bakshi Dalip Singh but it also affects of other shareholders who are not in the present petition before the court. For that reason also the compromise must be rejected. In this connection a reference may be made to the case of Dooly Chand Srimaly Vs. Mohanlal Srimali and Another, , wherein it is stated that the compromise which affects persons who are not parties to the suit will not be consider as a lawful compromise.

16. In Shanti Prasad Jain v. Kalinga Tubes Ltd. [1965] 35 Com Cas 351 (SC), which was cited before me, the scope of an inquiry under ss. 397 and 398 of the Companies Act has been fully examined. It, however, does not deal with the point in issue in the present proceedings, namely, whether every compromise in a petition under ss. 397 and 398 must be examined in order to ascertain whether the compromises is in the interest of the company or not. The opposition to the compromises has in fact come from the heirs of Major Jagtar Singh who are the majority shareholders of the company. The affidavit that has been filed on behalf of the company opposing the compromise is in effect and substances an affidavit of opposition from the majority shareholders and not an affidavit from the company itself. I am not here concerned with the interest of the majority shareholders per se but with the larger interest of the company. I have, therefore, not examined the point of view of the majority shareholders of the company except is so far as it pertains to the interest of the company as such. In the premises, an order cannot be passed in terms of the compromise.

17. Mr. Zaiwalla who appears for the company asks for vacating the order for costs passed against the company on June 15, 1979. As the company has substantially succeeded I am vacating the order for costs.

18. Petition to be on board for hearing on August 2, 1979.