(2008) 03 AP CK 0052

In the Andhra Pradesh High Court

Case No : Company Appeal No. 3 of 2008

Incable Net (Andhra) Limited and Others — APPELLANT

Vs

Apaksh Broadband Ltd. and Others — RESPONDENT

Date of Decision : 18-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1
Companies Act, 1956 — Section 10(1), 10E, 10E(4C), 10E(4D), 10E(5)
Criminal Procedure Code, 1973 (CrPC) — Section 195
Penal Code, 1860 (IPC) — Section 193, 228

Citation : (2008) 142 CompCas 892

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; C. Kodanda Ram, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The appellants herein (hereafter "the petitioners") filed company petition being C. P. No. 69 of 2006, before the Company Law Board (CLB), Additional Principal Bench, Chennai. It was under Sections 397, 398, 402 and 403 of the Companies Act, 1956, (the "Act", for brevity) alleging mismanagement and oppression by the majority shareholders of the first respondent-company. They prayed for various reliefs including reconstitution of board of directors of first respondent. By an order, dated December 17, 2007, Incable Net (Andhra) Ltd. v. Apaksh Broadband Ltd. [2008] 142 Comp Cas 860 (AP) the learned Company Law Board disposed of company petition declining to grant reliefs to the petitioners. Against the said order, present company appeal is filed u/s 10F of the Act.

2. The short fact of the matter may be noticed for better appreciation of the submissions of the counsel. First respondent M/s. APAKSH Broadband Limited ("APAKSH", for brevity) is a company registered under the Act in the State of Andhra Pradesh. Its business is in the field of telecommunications, information

technology and entertainment. Its entire authorised capital of Rs. 175 crores is issued and fully/partly subscribed (10,19,62,500 equity shares fully paid-up and 19,80,37,500 shares of Rs. 3 paid). The first petitioner is an incorporated company and the second petitioner is its managing director. All the petitioners hold fully paid up shares in APAKSH and allegedly constitute forty per cent. of the total number of members of the first respondent. Respondents Nos. 2 to 4 are directors of APAKSH. Respondent No. 5 holds 10,17,87,500 fully paid-up shares equivalent to 57 per cent. in APAKSH. In addition to these, petitioners group was allotted 7,38,75,000 partly paid shares and the fifth respondent was allotted 12,41,62,500 partly paid shares.

3. The Government of Andhra Pradesh in the Ministry of Communications and Information Technology proposed broadband network providing connectivity to all the Government offices across the State connecting with the State capital, with district, mandal, block and gram panchayats. The Government with the help of Andhra Pradesh Technology Services (APTS) identified consortium of companies led by the fifth respondent to form joint venture (JV) company, APAKSH Broadband Ltd., in which APTS would have shares. The contract to provide broadband connectivity at an estimated cost of Rs. 370 crores was awarded to APAKSH. The work is to be carried out by a special purpose vehicle (SPV) and accordingly engineering, procurement and construction (EPC) contract was executed on May 10, 2005, between APAKSH and AKSH. AKSH also entered into shareholders agreement (SHA) with the first petitioner. Under this agreement, the first petitioner was to acquire 21.10 per cent. of equity capital, AKSH was to acquire 64.60 per cent. equity capital. The balance 14.30 per cent. was to be allotted to APTS. On May 29, 2006, the board of directors of APAKSH passed a resolution to call upon holders of partly paid shares to bring balance of call money of Rs. 2 on or before February 28, 2006. The second petitioner addressed a letter requesting three months time for payment of call money, and the time was extended. In spite of the same, on December 2, 2006, the petitioners approached the Company Law Board and filed company petition seeking the following reliefs.

(i) To direct the first respondent-company to incorporate the shareholders agreement dated June 4, 2005, in the memorandum and articles of association of the first respondent-company;

(ii) To reconstitute the board of directors of the first respondent-company and provide that all policy decisions, and all decisions on key matters be decided by a board of directors at a meeting where at only one nominee from each of the groups, viz., the fifth respondent, the first petitioner apart from APTS nominee are present;

(iii) Appoint a chartered accountant to investigate into the investments made by the fifth respondent towards the share capital especially keeping in mind the source of funds for investments in share capital of the first respondent-company;

(iv) Appoint a team of chartered accountants/chartered engineers to evaluate the quantum of work done by the fifth respondent-company, and declare that the investments of the fifth respondent-company over and above the said quantum of work to have been issued without consideration and consequently annul the said shares and direct the modification of the shareholding of the first respondent-company;

(v) Vest the day-to-day administration of the first respondent-company to a committee of directors comprising of a nominee from each group viz., the petitioners, APTS and the fifth respondent and pass such other order (s) as the hon''ble Board deems fit and proper in the circumstances of the case.

4. They alleged that majority equity holders and EPC contractor AKSH mismanaged funds and operation of the company. Their contention was that project was delayed due to various acts of commission and omission on the part of AKSH and project implementation remained incomplete even after expiry of the project implementation period, i.e., December, 2006.

5. The respondent opposed company petition contending that contractual obligations under EPC contract fall outside the scope of Sections 397 and 398 of the Act and the right of the petitioners as shareholders is no way affected. The second petitioner being director and vice-chairman is also member of the managing committee to monitor project implementation and he never made out any grievance with regard to EPC contract. The minutes of the board meetings are signed by the second petitioner as the chairman and he alone was operating bank accounts. He paid an amount of Rs. 92 crores for the works performed under EPC contract to AKSH by way of cheque signed by him on behalf of the company. The petitioners approached the court withholding this information and therefore, they have no right to seek relief from the Company Law Board. None of the allegations made in the petition constitute acts of oppression and mismanagement. The petitioners being shareholders of APAKSH cannot enforce rights of the company against AKSH in evaluation of the work under EPC contract which provides dispute resolution mechanism by reference to arbitration. If company incurs losses it is the company alone which can sue for breach and shareholders have no such locus standi. Even if by alleged breach by AKSH, APAKSH incurs losses it is for the board of directors in their commercial wisdom to take necessary action and shareholders have no say in the matter of execution of EPC contract. The Company Law Board considered rival contentions and held that individual shareholders have no right to sue in the name of the company even if the company suffers legal injury and therefore, petition under Sections 397 and 398 of the Act is not maintainable. Nonetheless, the Company Law Board also considered relevant aspects of matter and dismissed the petition.

6. The Company Law Board constituted u/s 10E of the Act shall exercise and discharge powers and functions conferred on it under the Act. Its procedure is regulated by the Company Law Board Regulations, 1991, made u/s 10E(6) of the Act. Section 10E(4C) of the Act, which makes applicable, confers certain powers

which are vested in the court under the Code of Civil Procedure, 1908, while trying a suit in respect of discovery and inspection of documents, summoning witnesses, summoning documents, examining witnesses on oath, granting adjournments and reception of evidence on affidavits. As per Section 10E(4D) of the Act, the Company Law Board shall be deemed to be a civil court for the purpose of Section 195 of the Code of Criminal Procedure, 1973 (CrPC) and all proceedings taken before them shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 (IPC). Section 10E(5) of the Act adumbrates an important principle of judicial adjudicative resolution. It is to the effect that the Company Law Board, in exercise of its powers and discharge its functions under the Act, shall be guided by the principles of natural justice.

7. After entrustment of corporate dispute resolution to the Company Law Board by reason of the Companies (Amendment) Act, 1988, many of the powers and functions hitherto exercised by the High Court u/s 10(1) of the Act, are now exercised by the Company Law Board. Adjudication of dispute between minority shareholders and majority shareholders regarding controlling management of the company is one such subject which is in the realm of the Company Law Board''s jurisdiction. All orders passed by the Company Law Board in exercise of their jurisdiction are judicial orders. The orders of the Company Law Board, therefore, cannot be lightly interfered with. That is the reason why Section 10F of the Act which makes orders of the Company Law Board appealable to the High Court prescribes that an appeal against the order of the Company Law Board lies only "on any question of law arising out of order of the Company Law Board. It is not an appeal on facts nor it warrants roving secondary enquiry. It is only an appeal on question of law; not every question of law--but a question of law arising out of such order. Keeping this in view when the matter came up before this court, notwithstanding the voluminous record filed along with appeal, this court directed learned Counsel for the petitioners to address only on question of law arising out of the impugned order. Learned Counsel for the petitioners and learned Counsel for the respondents are heard elaborately on this aspect.

8. Learned Counsel for the petitioners contends that the fifth respondent''s control of first respondent is all pervasive. They also have a stake in sixth respondent and at their instance petitioners Nos. 1 to 4 pledged their shares in first respondent as security for an amount of Rs. 33 crores sanctioned by sixth respondent. Respondents Nos. 1, 5 and 6 therefore effectively rendered minority rights a myth. Taking advantage of this, the first respondent mismanaged implementation of broadband network project by not taking any action against the sixth respondent. He points out that the fifth respondent was paid an amount of Rs. 155.33 crores towards the supply of cable, which is defective (Rs. 111.14 crores and Rs. 37.33 crores towards services) even though there was scant progress in implementation of the project. Secondly, he would contend that the petitioners contributed most of the capital of 21 per cent. (out of Rs. 37 crores or 21.10 per cent.), which they were required to take but they were allotted only

0.01 per cent. of shares whereas fifth respondent contributed less than 20 per cent. of required capital (out of Rs. 113 crores or 64.40 per cent.) but were allotted 57 per cent. of the shares in the first respondent-company. This, he would urge, is an act of oppression. It is contended before the Company Law Board, though the petitioners wanted to lead oral evidence to establish their case and also letter of APTS, dated June 14, 2006, to Government of Andhra Pradesh about progress of the project was sought to be marked, the Company Law Board declined the request and therefore, failed to exercise jurisdiction vested in it. According to learned Counsel, if the execution of EPC contract, dated May 10, 2005, by the fifth respondent in collusion with the first respondent, is allowed, it is going to be detrimental and jeopardize the interest of the minority shareholders. The Company Law Board has power u/s 402(e) of the Act to terminate or modify the agreement between company and any person. The failure to exercise such power is a question of law arising out of order.

9. Respondents filed counter opposing admission of the appeal. Learned senior counsel for the respondents submits that the Company Law Board considered all documents, it has not ignored any issues, applied law correctly and, therefore, same is not vitiated by any error apparent on the face of the record nor a question of law would arise for consideration u/s 10F of the Act. He nextly contends that none of the rights of the petitioners is affected and therefore, a petition under Sections 397 and 398 of the Act for mismanagement and oppression would not lie. When the petition itself would not lie, there is no question of the Company Law Board exercising powers u/s 402 of the Act. He pointed out that the second respondent was the vice-chairman of the company, that he presided over meetings of the board, that he signed cheques and that he was also a member of managing committee to monitor project and, therefore, petitioners'' complaint before the Company Law Board in relation to these are not bona fide. Such allegations were made with a mala fide intention to avoid contribution of their capital when the board passed resolution on May 29, 2006, calling upon members to bring in call money for completion of the project. After receiving letter of the first respondent to pay call money on or before August 28, 2006, the second petitioner sought extension of time for three months and the same was granted. Till then the petitioners did not make any grievance. After extension of time for paying call money, they approached the Company Law Board in December, 2006. He submits that respondents Nos. 2 to 5 have nothing to do with the sixth respondent, and therefore, no role can be ascribed to them in the matter of the petitioners'' pledging their shares to sixth respondent. He further argued thus: (i) entire transaction in respect of which grievance is made was managed by the second petitioner; (ii) second petitioner alone signed all the balance-sheets and cheques through which amounts were paid to the fifth respondent; (iii) audit report of M/s. Suresh and Co., chartered accountants, was part of the annual report for 2005-06. As per this report, the first respondent maintained proper records and that there were no material discrepancies. The audit report was signed by the second petitioner; and (iv) annual general

meeting held on August 2, 2006, appointed M/s. S.R. Batliboi, chartered accountants, who wanted to inspect accounts of previous year, but the second petitioner objected to such audit, and therefore audit was stopped. He lastly points out that the second petitioner is very much member of the board of the first respondent and he can always raise issues before the board. He also made submissions with regard to progress of work with reference to the Government orders and communication of APTS, which contain positive element.

10. When minority shareholders complained acts of oppression and mismanagement, and sought the relief under Sections 397 and 398 of the Act, the first and foremost relevant issue would be with reference to the acts complained, whether shareholders in law can be given locus standi. The corporate governance and management of a company is regulated by provisions of the Act, rules made thereunder, memorandum and articles of association. Every company shall have atleast three directors collectively called board of directors or the board. In the absence of any constitution of the board as such, members of the company shall be deemed to be directors (Section 254 of the Act). As per Section 291 of the Act, the board shall be entitled to exercise all such powers and do all such things as the company is authorised to do. If the board acts in deviation of memorandum and articles of association, or provisions of the Act or ignoring Section 293 (restrictions and powers of board), the law does not let off the directors of the board. There are provisions and remedies for the members (shareholders) of the company for enquiry and investigation of acts of malfeasance and misfeasance (Sections 235 - 250 of the Act). In the event it is found that the directors are guilty of malfeasance and misfeasance, and acts and omissions, they can even be prosecuted under the Indian Penal Code for breach of trust and misappropriation. In the entire scheme of the Act, role of shareholders in day-to-day administration and management of the company is nil. The reason for such a thing is that if all the shareholders have management role even remotely, the company cannot run and progress in achieving its objects.

11. The corporate democracy envisaged in the Act is not direct participation of all the members in day-to-day management and administration of the company affairs. It has elements of indirect democracy where all the constituents of the general body elect governing body--board of directors (each share having the value of one vote). If majority shareholders elect their directors on the board or minority shareholders--by negotiation or compromise; have been given their due representation on the board, the shareholders cannot have any say in the management of the company. The right of a shareholder or minority shareholder collectively to seek enquiry/ investigation into the affairs of the company as a first step for launching civil and penal action against directors of the company or remedy provided under Sections 397 and 398 in cases of mismanagement and oppression do not even remotely confer locus standi on the shareholders to question business prudence or business decision of a company in dealing with third parties.

12. The above principle also applies when the company enters into EPC contract. When once contract is made as provided by Section 46 of the Act, the contract shall bind the company. If any breach is committed by the contracting party, as a juristic person, the company can sue and be sued as provided under Order XXIX, Rule 1 of the Code of Civil Procedure, 1908. It is a dispute between the company and a third party in relation to a contract or otherwise. The shareholders have no right to intervene nor have a right of impleadment. For adjudication of such lis, the shareholders are neither necessary parties nor proper parties. Indeed, EPC contract, dated May 10, 2005, provides for alternative dispute resolution by way of arbitration. Any dispute between APAKSH and AKSH necessarily involves the rights and obligations of the Government of Andhra Pradesh and APTS as active players in the implementation of the Andhra Pradesh Broadband network project. All these matters are not concern of the shareholders. The Company Law Board rightly came to the conclusion that in case of an injury, it is for the corporation to sue in its own name and individual shareholders have no right of suing for injury suffered by the corporation. That the company is not the property of shareholders is now accepted corporate legal philosophy. No one can better and emphatically say this than quoting from the judgment of justice P.N. Bhagwati (as his Lordship then was) in National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others, :

It is now accepted on all hands, even in predominantly capitalist countries, that a company is not property. The traditional view that the company is the property of the shareholders is now an exploded myth. There was a time when a group controlling the majority of shares in a company used to say: ''This is our concern. We can do what we like with it''. The ownership of the concern was identified with those who brought in capital. That was the outcome of the property-minded capitalistic society in which the concept of company originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values. Today social scientists and thinkers regard a company as a living, vital and dynamic social organism with firm and deep-rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contributes to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive dominion over the concern, as if the concern belongs to it? A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions.

13. Learned Counsel for the petitioners relies on Section 402(e) of the Act to

contend that the Company Law Board''s failure to exercise the power to terminate, set aside or modify the agreement between APAKSH and AKSH is the question of law u/s 10F of the Act. The submission cannot be accepted. Assuming that the petitioners as shareholders made out genuine grievance of about alleged non-performance of obligations by AKSH under EPC contract resulting in financial loss to APAKSH, the same cannot be in the facts and circumstances of this case, be branded as an act of mismanagement and oppression by the majority against minority shareholders. Secondly, any such breach of contract or non-performance of obligations cannot and should not be in relation to only two players--respondents Nos. 1 and 5--but such alleged breach can affect the rights and obligations of all the corporate players in the project. In the absence of two other players, namely, the Government of Andhra Pradesh and APTS, the Company Law Board could not have exercised their power u/s 402(e) of the Act. Thirdly, any modification of an agreement by the Company Law Board can be only be after obtaining consent of the party concerned. It is nobody''s case that the Government of Andhra Pradesh, APTS and AKSH gave consent for modification of EPC contract. Indeed, as rightly pointed out by learned senior counsel for the respondents, the petitioners never prayed to the Company Law Board either to terminate or modify EPC contract between APAKSH and AKSH. A statutorily constituted Tribunal no doubt would be committing an error if they failed to exercise jurisdiction vested in it or exercised jurisdiction, which does not vest in it and/or exercised jurisdiction vested in it erroneously. None of these is pleaded nor substantiated before this court.

14. In the impugned order, the learned Company Law Board noticed that the second petitioner, who is the managing director of the first petitioner was active in the management of APAKSH either as vice-chairman of the board or the member of project monitoring committee, that he signed as many as nine cheques, that he himself opposed the audit of previous year accounts by M/s. S.R. Batliboi and Associates and that the petitioners failed to bring in the final call money even after the learned Company Law Board passed orders on March 20, 2003, to that effect. These are matters which are questions of fact and were proved before the Company Law Board by necessary material. It is not, therefore, proper for this court to go into these matters, which are not contentious.

The learned Company Law Board considered all the material for appreciating the facts, applied law and recorded findings correctly. The question of law, therefore, does not arise out of the said order. The company appeal is misconceived.

15. In the result, for the above reasons, company appeal is dismissed in limine.